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LEADING AND SELECT CASES

ON

TRUSTS:

WITH

EXTENDED ABSTRACTS OF IMPORTANT CASES;

EXPLANATORY AND CRITICAL NOTES;

AND

NUMEROUS CITATIONS OF AUTHORITIES BEARING
ON EVERY BRANCH OF THE
LAW OF TRUSTS.

ALSO,

A FULL REPORT OF THE GREAT CASE

OF THE

COVINGTON AND LEXINGTON RAILROAD COMPANY, *P. 466.*

Against

ROBERT B. BOWLER'S HEIRS, AND OTHERS,

JUST DECIDED

AT THE WINTER TERM, 1873, OF THE COURT OF APPEALS
OF THE STATE OF KENTUCKY.

BY PETER ZINN,

Of the Cincinnati Bar.

CINCINNATI:

ROBERT CLARKE & COMPANY.

1873.

Clarence J. Nurdick

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PREFACE.

THIS work has its origin mainly in two circumstances: First, in there being heretofore no special compilation of authorities on the subject of TRUSTS; and, secondly, a desire to economize labor in the preparation of the Covington and Lexington Railroad case for trial. In default of being beneficial in that case, it was desired to put the result of this work in such form as to renew, in the attention of the profession and the reading public, the great rules for the administration of trusts. In their actual application, they have recently been so disregarded as to lead, in many cases, to the erroneous opinion that practice had established these rules adversely to the principles. As is well known to many, the labor indicated has been made almost the exclusive business of the author of this compilation, from the inception of the suit, in 1864-5, to the present time.

In the selection of Leading Cases, I have taken such as have been the result of the most deliberate consideration and labor of the judicial minds whose opinions have given shape and weight to the laws of England and America. In the choice of other cases, I have selected those especially lately decided, which, it is hoped, will prove of practical use to the profession, and still further illustrate the principles of those that have become leading, and are the productions of the "great masters," as it were. Several will be found of the most interesting character; and the intelligent non-professional reader will find in this volume, matter that will richly repay for the time consumed, as well in the interest of the narrative as in the information communicated. Several deserve special mention. Such are, the series of Girard Will cases; the Fisk and Erie Railroad

case; the Cumberland Coal Company cases; those on Charitable Bequests; the Washington and Georgetown Railroad case; those on the Marital Relations, etc. In these pages, in direct contradiction of the general opinion, that the law is specially dull and prosy, will often be found verified the more trite saying, that "truth is stranger than fiction." Several of them will be found particularly useful as practice cases, and in pointing out the ways by which equity works out the relief administered, especially the Kentucky case of *Faris v. Dunn*, 297.

In the report of the great railroad case already referred to, the intention has been to deal with it with strict impartiality; and especially to present the points of law and testimony upon which the parties respectively relied. Of course, all this can not be done satisfactorily within the hundred pages devoted to it.

In the arrangement of the notes, the intention has been to illustrate the text, and aid in the examination of the different points decided. The endeavor has been to make a useful rather than an ornamental work.

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LEADING AND SELECTED CASES

ON

TRUSTS.

DAVOUE v. FANNING, ANN HIS WIFE, AND OTHERS.

[*This case was decided by the Court of Chancery of the State of New York, in 1816; JAMES KENT, Chancellor. Reported in 2 Johnson's Chancery Reports, 252.*]

A testator bequeathed legacies to each of his seven children, "to be paid out of the bulk of his estate;" and if his executors found that the estate fell short of the amount of legacies, then they were to make an abatement in proportion; and he, afterward, directed that so much of his real estate as should be necessary to furnish the sums bequeathed, should be sold at public auction, when his children should attain full age, and the remainder be leased by his executors; and that when the youngest child arrived at full age, all his real estate and property, not otherwise disposed of, should be sold, and the proceeds, with the amount of the personal property, be divided among the children, etc. *It was held*, that the sole acting executor had power to sell the real estate under the will.

If a trustee, or person acting for others, sells the trust estate, and becomes himself interested in the purchase, the *cestui que trusts* are entitled, as of course, to have the purchase set aside, and the property re-exposed to sale, under the direction of the Court. And it makes no difference in the application of the rule, that a sale was at public auction, *bona fide*, and for a fair price, and that the executor did not purchase for himself, but a third person, by previous arrangement, became the purchaser, to hold in trust for the separate use and benefit of the wife of the executor, who was one of the *cestui que trusts*, and had an interest in the land under the will of the testator.

THE plaintiff is an infant daughter of Frederick Davoue, deceased, who, by his last will, bequeathed to her, and her sister Ann (one of the defendants, and wife of the defendant Fanning), \$5,000 each, "to be paid out of the bulk of the property," when they should become of age, or marry. The testator

directed, that so much of his real estate as should be necessary to furnish the sums he had therein before bequeathed to his children, should be sold at public auction when his children should attain to full age, etc., and the remainder of his real estate to be leased or rented, by his executors.

The bill charged, that the defendant Fanning, the sole acting executor, pretending that the personal estate was insufficient to pay the debts and legacies, sold a lot of ground in New York, though he had no authority by the will to do so, and that he caused the same to be purchased by Hedden, the defendant, for himself, or in trust for his wife, the said Ann, which was not lawful, and to the injury of the plaintiff; and that since the sale, Fanning, the defendant, had caused buildings to be erected on the lot, and on the 25th August, 1815, mortgaged the property to the defendant Ashfield, to secure \$3,000, payable in one year, which sum was borrowed toward paying the expense of the buildings. The bill prayed, that the sale of the lot might be set aside, and the premises resold, etc.

The answer stated, that there was not property enough to pay the debts and legacies; and that Fanning was the sole acting executor of the testator, and that he caused the lot to be sold at auction, as, he alleged, he had authority to do under the will. That to secure to the defendant Ann her legacy, for her and her children, independent of her husband, she and her husband requested the defendant Hedden to attend the sale at auction, and purchase the lot for her, if it should be sold for less than \$4,000; that the defendant Hedden attended the sale and bought the lot for \$3,800, for the said Ann; and the answer denied that the defendant Fanning had any other or further concern in the purchase, which the defendants insisted was correct and proper, and in no way injurious to the plaintiff. That the defendant Fanning, as sole acting executor, on the 29th of July, 1815, executed a deed for the lot to Hedden, in trust for the sole and separate use of the defendant Ann, and to be at her own disposal. That Fanning received no money or other consideration, but only, as executor, credited the \$3,800 on account of the legacy due to his wife. That the defendant Ann has erected the buildings on the lot, and she and Hedden,

and the defendant Fanning, in her behalf, mortgaged the premises to the defendant Ashfield, for \$3,000, payable in one year from the 25th of August, 1815, for which they gave their joint bond; that the whole of the money borrowed was applied toward the cost of the buildings, and that about \$2,500 still remains due for the expenses of the buildings. The defendants insisted that the mortgage was valid, and ought first to be paid, and the residue of the moneys due ought to be charged on the lot, if the sale should be rescinded; or if the defendant Fanning is to be responsible for the sums due, the defendant Ann ought to hold the property; but that if the property is resold, so much of the proceeds as belong to her ought to be appropriated for her separate use, etc.

The cause came on to be heard on the bill and answer.

Van Wyck, for plaintiff. *T. A. Emmet*, for defendants.

THE CHANCELLOR. 1. The first question arising upon this case is, whether the sole acting executor, who was the defendant Henry Fanning, was authorized under the will, without the direction of this Court, to sell any part of the real estate.

If all the executors named had the power by the will, then the sole acting executor has the power by the statute (N. R. L., vol. 1, p. 366), on the neglect or refusal of the rest of the executors to act.

The will directs that the real estate be sold at public vendue, when it shall become necessary to raise money for the legacies, or when all the children are of age; but it does not say expressly *who shall sell*, though I think, as Lord HARDWICKE did in a case somewhat similar, *Black v. Willer*, 1 Atk. 420, that it is a very reasonable construction, that the power was given to the executors. It seems almost impossible to mistake the testator's meaning on this point. He directed that an inventory of the *real* and personal estate should be taken by the executors; that they were to give the younger children such education as they should think proper; that the legacies of 2,000*l.* to each of the seven children, were to be paid out of "the bulk of the estate," as they should respectively become of age; and that if the executors should find that "the estate" fell short of the legacies, they were to make a deduction and apportionment,

according to a rule prescribed. The testator then adds, "I will and direct, that so much of my real estate as shall be necessary to furnish the sums which I have heretofore bequeathed to my children, shall be sold at public vendue, when they shall attain the full age to possess the same, and the remainder of my real estate to be leased or rented by my *executors*; and that when my youngest child shall have attained unto full age, that then all my real estate and property, not otherwise disposed of, be sold, etc., and the proceeds, with the amount of the personal property, be divided among the children," etc.

It is to be observed, that the will directs that the personal property be immediately sold, and the proceeds put at interest, etc., but it is equally silent as to the persons who are to sell it.

The object of the power to sell was to raise money for the legacies, which it is, of course, the duty of the executor to discharge; and the will regulates the sale, by declaring it to be at public auction, which it would not have done, if it was intended that the sale should not be made by the constituted agents of the will, but under the directions of this Court. Indeed, taking the whole will together, I think it is a very necessary conclusion, that the executors were the persons intended by the testator to execute the power to sell.

2. The next and principal point in the case is, whether the plaintiff is not entitled to set the sale aside, because the executor, by a previous arrangement, suffered the property to be purchased in for his wife, and executed a deed in pursuance of the sale in trust for her.

It is contended, on the part of the defendants, that this sale is not open to objection, inasmuch as it was at public auction, and *bona fide*, and for a fair price, and the purchase was not made for the benefit of the executor himself, but for the benefit of his wife, who was one of the *cestui que trusts*, having an interest in the land. But I am of opinion that these circumstances do not vary the application of the general rule.

The executor, in selling a part of the estate to raise a particular legacy, was acting as a trustee for all those who were interested in the estate under the will, and not exclusively for the benefit of his wife, whose particular legacy he was raising. The plaintiff, and all the other children, had an equal interest

with the defendant's wife that the property should be sold to the best advantage, because the greater the price, the greater would be the dividend of the residuary estate. They were all equally *cestui que trusts* of the executor; for he was charged with the duty of applying the proceeds of the estate to their use, and of eventually selling the whole real estate for distribution among them. If, in selling a part of the estate, in the mean time, for a legacy to his wife, he could become the purchaser on her account, or constitute an agent for that purpose, the temptation to abuse of trust would be great and dangerous. Whether a trustee buys in for himself or his wife, the temptation to abuse is nearly the same. Though the money he was raising was to go to the wife, it was no reason why he should be permitted to buy in for her the *estate itself*, when the plaintiff and others had also legacies to be raised out of the estate, and were equally entitled to their share of what should be remaining. His interest here interfered with his duty. *Emptor emit quam minimo potest; venditor vendit quam maximo potest*. Indeed, the very fact that the executor was, in that instance, exercising the general powers of his trust for the benefit of his wife, was peculiarly calculated to touch and awaken the suggestions of self-interest. The case, therefore, falls clearly within the spirit of the principle, that if a trustee, acting for others, sells an estate, and becomes himself interested in the purchase, the *cestui que trust* is entitled to come here, as of course, and set aside that purchase, and have the property re-exposed for sale.

I consider this to be a sound and settled doctrine of the Court. But as the point is extremely important, and has been long and greatly agitated, it will be safer, and certainly more satisfactory to the parties, that I should not only lay down the rule, but look into the authorities on which it is supported.

The earliest case I have met with, containing any full recognition of the principle, that a trustee can not act for his own benefit on a subject connected with the trust, is that of *Holt v. Holt*, in the 22 Car. II., 1 Ch. Cas. 190, where it was held, by the Lord Keeper BRIDGMAN, assisted by the judges, that if an executor in trust renewed a lease, it should be for the benefit of the *cestui que trust*. The next case that occurs was that of *Keech v. Sandford*, before Lord Ch. KING, in 1726, 3 Eq. Cas.

Abr. 741. A lease of the profits of a market was devised to a trustee, in trust for an infant; before the expiration of the term, the trustee applied to the lessor for a renewal for the infant's benefit, which he refused, because he could not distrain, but must rest singly on covenant, which the infant could not make. The trustee then took a lease to himself, and the chancellor decreed, that the lease should be assigned to the infant, and that the trustee should be indemnified from the covenants in the lease, and the trustee account for the profits since the renewal. He said he must consider it a trust for the infant, "for if the trustee, on refusal to renew, might have a lease to himself, few trust estates would be renewed to *cestui que trusts*; and though it might seem hard that the trustee was the only person of all mankind who might not have the lease, yet it was very proper that the rule should be strictly pursued, and not in the least relaxed, for it was very obvious what would be the consequence of letting trustees have the lease on refusal to renew to *cestui que trusts*."

If we go through all the cases, I doubt whether we shall find the rule and the policy of it laid down with more clearness, strictness, and good sense. This decision has never been questioned; and that a trust results on the renewal of an infant's lease, has since been regarded as a familiar point, 1 Bos. & Pull. 376.

The general principle was first brought before Lord HARDWICKE, in *Davison v. Gardner*, in 1743, and the rule was admitted with rather more relaxation than is tolerated at this day, if we can rely upon the account of this MS. case, as it is variously stated in some of the elementary compilers; 1 Cruise's Dig. 551; Sugden's Law of Vendors, 436. The case was a purchase of a *feme covert* of her interest in a brew-house. She acted at the time as a *feme sole* in respect to her separate estate, and the defendant, who purchased of her, was her trustee. The chancellor would not set aside the sale, because she received the full value, and the purchase was fair. I do not know that this case differs, in this respect, from the later decisions, for they all allow a trustee to purchase from the *cestui que trust*, under very special and guarded circumstances, amounting to a fair and distinct dissolution of the trust connection between them, at the time of the purchase. Lord HARDWICKE observed, that the

court always looks with a jealous eye at a trustee purchasing of his *cestui que trust*; and he would not permit any purchase, by a trustee, during the minority of the *cestui que trust*; but he said, that where there was a decree for the sale of the trust estate, and an open auction by the master, or a public sale, by proclamation, in the country, there the court had permitted a trustee to purchase, by refusing to set aside the sale, when all other circumstances were fair. I apprehend these latter *dicta* are clearly overruled, and that whether the *cestui que trust* be an infant or an adult, and whether the sale be public or private, the trustee is equally disabled from becoming a purchaser of the trust estate. The next case before Lord HARDWICKE was that of *Whelpdale v. Cookson*, in 1747, 1 Vesey, 9; 5 Vesey, 682, S. C. That was a bill by a creditor against the defendants, as executors and trustees. The answer admitted a purchase at auction of part of the estate, and the chancellor would not suffer it to stand, as he said he knew the dangerous consequence, and that it was not enough for the trustee to say *you can not prove any fraud*, for it is in his own power to conceal it. He, therefore, ordered the creditors to elect, whether they would abide by the purchase; and declared, that if a majority elected not to abide by it, he would order a resale by the master.

This case corrects the inaccurate *dictum* in the preceding one, that a sale at auction took away the objection, and it lays down the rule, and the remedy, in clear and precise terms. The only thing to be objected to in the report of the case is, that the remedy should be made to depend upon the will of a *majority* of the *cestui que trusts*; for this is not only questioned in the later cases, but seems contrary to the settled rights of parties, for one *cestui que trust* has no power to control or give away the right of another.

The case of *Fox v. Mackreth*, which arose before Lord THURLOW, in 1788, 2 Bro. 400; 6 Vesey, 627; 9 Vesey, 247, and underwent long and great discussion, is important only to show the solidity and value of the principle, that a trustee can not be permitted to purchase, even of his adult *cestui que trust*, unless he has first fairly discharged himself from his office of trustee, and placed himself in circumstances to make a fair contract. This is the same doctrine which had been intimated

by Lord HARDWICKE, in *Ayliffe v. Murray*, 2 Atk. 59. But in *Whichcote v. Lawrence*, 3 Vesey, 740, Lord ROSSLYN seems to have spoken with a carelessness and latitude of expression, which has given occasion to much criticism in the subsequent cases. An estate was conveyed to trustees, to sell for the benefit of creditors; the estate was put up at auction, and the defendant (one of the trustees) purchased two lots, for which he received deeds from the other trustees, and he afterward resold his lots at a profit. The bill was by three only of the numerous creditors, praying that this trustee might account for the profit he had so made, and it was so decreed, with costs. It is to be observed, that relief was here granted to a minority of the creditors, and it is not the decree, but the observations of the chancellor, that are deemed inaccurate. He said the trustee had here made a profit, and he did not recollect a case, in which the mere abstract rule came distinctly to be tried, abstracted from the consideration of advantage made by the purchaser. That the proposition was not true, that where the trustee to sell was the purchaser, the sale was, *ipso jure*, null. That the real sense of the proposition was, that the trustee to sell should not gain any *advantage* by being himself the person to buy. That he is not to be permitted to gain profit by the execution of the trust; that unless the advantage be made, the purchase will never be questioned, and that it was not true as a naked proposition, that a trustee can not buy of his *cestui que trust*.

The objection to most of these observations is, that they do not place the question on the true principle. However innocent the purchase may be in the given case, it is *poisonous in its consequences*. The *cestui que trust* is not bound to prove, nor is the court bound to judge, that the trustee has made a bargain advantageous to himself. The fact may be so, and yet the party not have it in his power, distinctly and clearly, to show it. There may be fraud, as Lord HARDWICKE observed, and the party not able to prove it. It is to guard against this uncertainty and *hazard* of abuse, and to remove the trustee from temptation, that the rule does and will permit the *cestui que trust* to come, at his own option, and without showing actual injury, and insist upon having the experiment of another sale.

This is a remedy which goes deep, and touches the very root of the evil. It is one which appears to me, from the cases which have been already cited, and from those which are to follow, to be most conclusively established.

In *Campbell v. Walker*, 5 Vesey, 678; 13 Vesey, 600, Lord ALVANLEY, then master of the rolls, declared, that the rule necessarily existed to this extent. That was a devise of real estate to the trustees to sell. They sold at auction, and bought in a part for themselves, at a fair price. There was no proof that the purchase was at an undervalue, or that the sale was not *bona fide* and regular. The bill was in behalf of residuary legatees, then infants, to have the sale set aside, and the lands resold. It was accordingly so decreed; and the master of the rolls said, that the rule did go to the extent, that the *cestui que trust* had a right to set aside the purchase, and have the estate resold, if he chose to say, in any reasonable time, that he was not satisfied with it. The trustee purchases subject to that equity. He buys with that clog. The only way for a trustee to purchase safely, if he is willing to give as much as any one else, is by filing a bill, and saying, so much is bid, and I will bid more, and the court will then examine into the case, and judge whether it be advisable to let the trustee bid. In that way the court will divest him of his character of trustee, and prevent all the consequences of his acting both for himself and for the *cestui que trust*. In no other way, as he observed, could the trustee become the purchaser, without being liable to be called upon to give up his purchase. It is impossible to know whether any advantage has been gained by the purchase, or whether the trustee did all he ought to have done. In that very case, he still retained the land, the defendants were still trustees, and if the plaintiffs elected to have the premises resold, they must be resold.

When this cause was, afterward, brought before Lord ELDON, on the master's report of the sale, the infants recovered their costs; and he observed, that a trustee for sale could not contract with the *cestui que trust*, until he had distinctly and honestly removed himself from the relation of trustee, which could not have been done, in that case, as the *cestui que trusts* were infants. He said that a sale by auction made no solid

difference, as the auctioneer was an agent employed by the vendor.

It appears to me, that the observations of Lord ALVANLEY, in the above case, illustrate the true rule and the reason of it, in a forcible and perspicuous manner; yet it would seem that he acted in direct contradiction to his own opinion, for he first directed an inquiry, by a master, whether a resale would be for the benefit of the infants. This was shaking the principle itself. There was hazard in the inquiry, and it was far from checking such sales. Lord ELDON expressed his disapprobation of the inquiry; and it was certainly an instance of surprising inconsistency between the reasoning and the conclusion.

Lord ROSSLYN, in the case *ex parte Reynolds*, 5 Vesey, 707, seemed to adopt the true rule, that a trustee can not purchase without being exposed to a resale. In that case, the assignee of a bankrupt purchased at auction the estate of a bankrupt, under the commission, and the chancellor ordered the estate to be set up again, and that if it did not sell for more than he gave, the purchase was to stand.

I proceed next to the decisions by Lord ELDON, which are uniform in support and vindication of the rule. They leave no possible doubt on the subject. Thus, in the case *ex parte Lacey*, 6 Vesey, 625, the assignee of a bankrupt was purchaser of part of his estate, and the chancellor declared, that when a trustee undertakes to manage for others, he undertakes not to manage for his own benefit; that he can not buy until, by a new contract with his *cestui que trust*, he has stripped himself of his character of trustee; but even this new contract is watched with infinite and the most guarded jealousy, because he may have acquired information, as trustee, which the court can not be certain he has communicated to the *cestui que trust*. He disavows the interpretation of Lord ROSSLYN, that the trustee must make advantage. Whether he makes advantage or not, if the connection does not satisfactorily appear to be dissolved, it is in the choice of the *cestui que trust*, whether or not he will take back the property. The ground of the rule is, that though you may see, in a particular case, that he has not made advantage, it is impossible to examine sufficiently, in ninety-nine cases out of a hundred, whether he has made advantage or not.

In this case, another sale was ordered, and the premises were directed to be put up at the price the assignee gave, and if no more was bid, the purchase was to stand.

In another case, *ex parte Hughes*, 6 Vesey, 617, Lord ELDON thought that a creditor of the bankrupt, or any agent of the sale, was within the reason of the rule, and could not be permitted to bid; and in this case he ordered the property to be set up for resale, at the price the creditor gave, together with the amount of his *bona fide* and substantial improvements, which were to be allowed him, and that if the property sold for more, he should be paid for his improvements out of the purchase-money, and if not, that he should be held to his purchase. This rule of setting aside the purchase by the trustee, at the option of the *cestui que trust*, and of directing a resale, upon the condition that the property produces a better price, was afterward adopted by Sir WILLIAM GRANT, in *Lester v. Lester*, 6 Vesey, 631, and he said the rule was so established in Lord THURLOW's time.

The case *ex parte James*, 8 Vesey, 337, contains a still further illustration and confirmation of the rule. It was there applied to a purchase, at auction, by a solicitor to the bankrupt commission, who was considered, as well as the assignees, to come within the mischief to be prevented; and he explicitly declared, that he did not proceed upon the ground of undervalue or want of fairness in the purchase, but upon the general principle. This case is deserving of notice, in another respect, for it may be considered as overruling the *dictum* or decision of Lord HARDWICKE, that a majority of the *cestui que trusts* was sufficient to ratify the purchase of the trustee; for Lord ELDON declared, that the solicitor was not entitled to hold the land against the consent of any of these persons entitled to the surplus of the estate. He had said, also, in another place, 6 Vesey, 625, that he held that opinion of Lord HARDWICKE to be erroneous.

In the case *ex parte Bennett*, 10 Vesey, 385, Lord ELDON went again, and at large, into the policy, the necessity, and the authority of the principle which we are considering. I need not repeat the argument, though I think that, in that case, he dwelt upon the subject with uncommon interest and vigor

of decision. He applied the rule once more to the solicitor to a commission of bankruptcy, and to the commissioner purchasing for himself *or for another*. To permit either to bid, would be applying the information acquired by their trust to their own benefit. He said it was settled, that it was not requisite to show that the trustee had made any advantage by the purchase. If a trustee can buy in an honest case, he may in a case having that appearance, but which, from the infirmity of human testimony, may be grossly otherwise; and yet the power of the court would not be equal to detect the deception. Human infirmity will rarely permit a man to exert against himself that providence which a vendor ought to exert, in order to sell the estate most advantageously for the *cestui que trusts*, and which a purchaser is at liberty to exert for himself, in order to purchase at the lowest price. If the trustee can not bid for himself, he can not, on the same principle, bid for another. The distinction of its being a weaker temptation, is too thin to form a safe rule of justice. The decree there was, also, that the expense of the lasting repairs and substantial improvements, made subsequent to the purchase, should be added to the purchase-money, and the estate put up again at the accumulated sum.

In *Randall v. Erington*, 10 Vesey, 423, the sale was fair, and the purchase by the trustee, at auction, for a full price; but he had subsequently sold a part, at some profit, and the court opened the sale at the request of the *cestui que trust*, as to the parts not sold, and held the trustee to account for the profit on the part he had sold.

It remains only to observe, that during the time that Lord ERSKINE presided in the Court of Chancery, he gave the most unequivocal sanction to these doctrines, and declared that they were founded on the clearest principles of equity, and the general security of contracts, *Morse v. Royal*, 13 Vesey, 355; *Lowther v. Lowther*, 12 Vesey, 95. He went so far as to say, that there was so much difficulty in supporting a purchase by a trustee, even from his *cestui que trust*, and it required to be guarded with so much jealousy, that it would have been better to have interdicted it altogether. Indeed, no person could have expressed himself in stronger language, as to the delicacy and danger of *such* purchases, than Lord ELDON himself did on

repeated occasions, *Coles v. Trecothick*, 9 Vesey, 234; *ex parte Bennett*, 10 Vesey, 385.

It is proper to observe here, that this whole chancery doctrine has received the entire approbation and sanction of the Supreme Court of Pennsylvania, 3 Binney, 54; 4 Binney, 43. Those decisions come with the more force, and are the more applicable as authority, when we consider that the court is obliged, from the necessity of the case (as they have no chancery tribunal), to study, adopt, and apply equity principles more freely and more liberally than is usual in courts of law.

The same doctrine has, also, been recognized in our own courts. The Supreme Court, in *Jackson v. Van Dalfsen*, 5 Johns. 43, admit it to be a well-settled rule in equity, that a trustee, or agent to sell, shall not, himself, become the purchaser; and they very properly refer the remedy of the *cestui que trust* in such cases to the cognizance of chancery. The doctrine underwent much discussion in this Court, and finally the Court of Appeals, in *Munro v. Allaire*, 2 Caines's Cas. in Er., 183. Allaire was one of the executors of Benjamin Palmer, deceased, with power to sell the real estate, and he purchased of Mary Palmer, the widow and devisee, and, also, one of the executors, her right in the whole estate. She, subsequently to this purchase, conveyed her right to Munro and Sniffin, and a bill was filed by Allaire for a specific performance of his agreement with Mary Palmer, and for a more perfect assurance and conveyance of her right. The purchase was charged to have been fairly made, after long consultation, in which she was assisted by a friend; and that Allaire gave a full price, and more than had been previously offered by another. To this bill Mary Palmer filed a demurrer, which was overruled in this Court, and she was ordered to answer. From this decretal order an appeal was brought, and the decree, overruling the demurrer, was reversed in the Court of Appeals, in 1796.

This decree of the court, in the last resort, assumed the doctrine of the general disability of the trustee to purchase from the *cestui que trust*. It was not intended to be understood, I presume, of an absolute, unqualified disability, such as Lord ERSKINE was willing to adopt; for there were circumstances relied upon, in this case, to show that neither Mary Palmer, or

her friends, were acquainted with the nature or extent of the rights she undertook to convey. The case may, therefore, be considered as establishing only the general doctrine in *Fox v. Mackreth*, and in the other cases which I have noticed. But I allude to the case as containing a full recognition of the general rule, that a trustee to sell can not, himself, purchase. The only opinion given in the Court of Errors (at least, the only one published), is that of Mr. Justice BENSON, in which the rule is laid down in these broad and general terms: "It is a principle," he says, "that a trustee can never be a purchaser; and I assume it as not requiring proof, that this principle must be admitted, not only as established by adjudication, but also as founded in indispensable necessity, to prevent that great inlet of fraud, and those dangerous consequences which would ensue, if trustees might themselves become purchasers, or if they were not, in every respect, kept within compass. Although it may, however, seem hard that the trustee should be the only person of all mankind who may not purchase, yet, for very obvious consequences, it is proper the rule should be strictly pursued, and not in the least relaxed."

We can not but notice the precision and accuracy with which the rule, and the reason of it, are here stated; but the rule appears to be much weakened in the subsequent part of the opinion.

He makes a distinction to show that the rule, thus laid down, is not to be understood in an absolute, unqualified sense. A trustee, it is said, is never to be assisted in this Court, by giving effect to such a purchase; but it does not follow that chancery is bound, in every case, and of course, to annul such a purchase, on the application of the *cestui que trust*. His words are, "That it is not, in every instance, indispensable that all the *cestui que trusts* should agree to waive the implied fraud; it may be sufficient for a majority, or such other number, or proportion of them, to agree, as that, according to the circumstances of the case, it may be presumed there was no fraud in fact."

It appears to me, with great submission, that the learned judge has, in these observations, wounded the true principle which he had before so clearly declared. I presume he was misled by the case of *Whelpdale v. Cookson*, in which Lord

HARDWICKE held that a majority of the *cestui que trusts* were sufficient to establish the purchase, whether the minority were consenting or not, and which case has been repeatedly questioned, and, in practice, overruled. But this is not all. He seems to think the court are only to be satisfied that there was no *fraud in fact*, whereas it has been, again and again, decided, and the principle pervades the whole body of the cases, that the inquiry is not whether there was, or was not, fraud in fact. The purchase is to be set aside, at the instance of the *cestui que trust*, and a resale ordered, without weighing the presumption of fraud, on the ground of the temptation to abuse, and of the danger of imposition inaccessible to the eye of the court.

In addition to these cases in our own courts, I may refer to the statute which prohibits a sheriff, or other officer to whom an execution is directed, from purchasing at the sale under it. This is in affirmance of the same general rule; and the other statute, which allows a mortgagee, selling under a power, to purchase in the land, provided the sale be, in every other respect, regular and fair, does, by that very exception, recognize the existence of the rule in all other cases.

There is one case more on this subject too important to be omitted; that of *The York Buildings Company v. Mackenzie*, which was decided in the English House of Lords in 1795, on appeal from the Court of Sessions in Scotland, 8 Bro. P. C. by Tomlins. App.

That case is a complete vindication of the doctrine I am now to apply; and, considering the eminent character of the counsel [for the appellants, *J. Mansfield*, *J. Mackintosh*, *R. Dundas*; for respondent, *J. Scot*, *William Grant*, *W. Adam*] who were concerned, and who have since filled the highest judicial stations, and the ability and learning which they displayed in the discussion, it is, perhaps, one of the most interesting cases, on a mere technical rule of law, that is to be met with in the annals of our jurisprudence.

The appellants were an insolvent company, and their estates were sold by order of the Court of Sessions, at a public judicial sale, to satisfy creditors. The course at such sales is to set up the property at a value fixed upon by the court, which is called the *upset price*, and which is founded on information procured

by the *common agent* of the court, who has the management of all the outdoor business of a cause. The respondent here was the common agent in that cause, and he purchased for himself, at the upset price, no person appearing to bid more, and the sale was confirmed by the court; and in the course of eleven years' possession, he had expended large sums for building and improvements. There was no question as to the fairness and integrity of the purchase. But the object of the appellant was to set aside the sale, and have the estates sold anew, on the ground that the respondent, being the common agent in court, in behalf of all parties, to procure information and attend the sale, was in the nature of a trustee, and so disabled to purchase.

The reasons of the House of Lords for setting aside the sale are not given, and we are left to infer them from the argument upon which the appeal was founded.

The appellants contended, that the common agent was under a disability to purchase, arising from his office; that the rule was founded in reason and nature, and prevailed wherever any well-regulated administration of justice was known; that the disability rested on the principle which dictated that a person can not be both judge and party, and serve two masters; that he who is intrusted with the interest of others, can not be allowed to make the business an object to himself, because, from the frailty of nature, one who has power will be too readily seized with the inclination to serve his own interest at the expense of those for whom he is intrusted; that the danger of temptation does, out of the mere necessity of the case, work a disqualification; nothing less than incapacity being able to shut the door against temptation, where the danger is imminent, and the security against discovery great; that the wise policy of the law had, therefore, put the sting of disability into the temptation, as a defensive weapon against the strength of the danger which lies in the situation; that the parts which the buyer and seller have to act, stand in direct opposition to each other in point of interest; and this conflict of interest is the rock, for shunning which the disability has obtained its force, by making that person, who has the one part intrusted to him, incapable of acting on the other side.

Several cases were referred to in the civil law, showing

clearly, that the same principle had a deep and firm foundation in that system, and was most extensively applied, as for instance, to guardians, tutors, curators, procurators, judicial officers, and all other persons who, in any respect, as agents, had a concern in the disposition and sale of the property of others, whether the sale was public or private, judicial or otherwise. The passages to this purpose are to be found in the Digest, lib. 18, tit. 1, ch. 34, s. 7, and lib. 18, tit. 1, ch. 46, and in lib. 26, tit. 8, ch. 5, s. 2.

The counsel for the respondent admitted the general principle, and contented themselves with denying its application, holding that the common agent was not to be considered, in that case, and in respect of that sale, in the character of seller or trustee.

But the House of Lords thought otherwise, and set aside the sale, ordering the purchaser to account for the rents and occupation in the mean time, with a liberal allowance to him for his permanent improvements. This decision certainly carried the doctrine to its full extent, and it may be considered as a high and authoritative sanction given to the reasoning which accompanied the appeal (*a*).

I shall, accordingly, set aside this sale, upon the usual terms.

The following decree was entered :

“ This cause being submitted by the counsel for the respective parties, upon the bill and answer, and the same being duly considered, and it appearing to the Court, that though the said Henry Fanning, as sole acting executor, etc., had authority, under the will, to sell the lot of land in the pleadings mentioned, to raise the legacy due to his wife ; yet, inasmuch as he caused the said lot, on such sale, to be purchased in for the benefit of his wife exclusively, it is ordered, etc., that the said sale to the defendant Hedden, in trust for the wife of the defendant Fanning, be set aside, and vacated, upon the following conditions, viz.: that the said lot be re-exposed to sale, at public auction, by the defendant Henry Fanning, with the concurrence and agency of one of the masters of this Court, on giving four weeks’ notice of the time and place of sale, in two of the daily papers

(*a*) For a further history of *The York Buildings Company* case, see note to *The Aberdeen Railway Company v. Blakie Brothers*, hereinafter.

printed in the city of New York. That the said lot be put up at the sum of \$9,600, being the amount of the former sale, together with the principal and interest of the mortgage since charged thereon, and of the debts incurred for substantial improvements, and if the said lot, with the improvements thereon, shall not sell for more than the said sum, \$9,600, the sale heretofore made shall, in all respects, stand confirmed; but if the said lot shall sell beyond that sum, then the former sale shall be held to be vacated, and the defendant Henry Fanning, as acting executor aforesaid, together with the said master, shall execute a deed in fee to the purchaser, on receiving the consideration-money, which moneys shall be received by the said master, and forthwith thereafter brought into Court, to be subject to its further disposition; and the question of costs, and all further questions, are, in the mean time, reserved (a).

WILLIAM OLIVER, MICAJAH T. WILLIAMS, AND OTHERS, APPELLANTS, v. ROBERT PIATT.

[*This case was decided by the Supreme Court of the United States, at its January Term, 1845, Associate Justice JOSEPH STORY delivering the opinion. At that time the Court was composed of Chief Justice ROGER B. TANEY, and Associate Justices JOSEPH STORY, JOHN M'LEAN, JAMES M. WAYNE, JOHN CATRON, JOHN M'KINLEY, PETER V. DANIEL, and SAMUEL NELSON. Reported in 3 Howard, 333.*]

In cases of trust, where the trustee has violated his trust by an illegal conversion of the trust property, the *cestui que trust* has a right to follow the property into whosoever hands he may find it, not being a *bona fide* purchaser for a valuable consideration, without notice.

Where a trustee has, in violation of his trust, invested the trust property or its proceeds in any other property, the *cestui que trust* has his option, either to hold the substituted property liable to the original trust, or to hold the trustee himself personally liable for the breach of trust.

(a) I have selected this as worthy to be the first in this collection of "Leading and Selected Cases on Trusts," because it still stands as recognized authority and binding in equity, as well as because of the valuable citation of authorities that it contains, and the weight that is universally conceded to the opinions of the great Chancellor from whom it emanated.—EDITOR.

The option, however, belongs to the *cestui que trust* alone, and is for his benefit, and not for the benefit of the trustee.

If the trustee, after such an unlawful conversion of the trust property, should repurchase it, the *cestui que trust* may, at his option, either hold the original property subject to the trust, or take the substituted property in which it has been invested, in lieu thereof. And the trustee, in such case, has no right to insist that the trust shall, upon the repurchase, attach exclusively to the original trust property.

Where the trust property has been unlawfully invested, with other funds of the trustee, in other property, the latter, in the hands of the trustee, is chargeable *pro tanto* to the amount or value of the original trust property.

What constitutes notice of a trust?

An agent, employed by a trustee in the management of the trust property, and who thereby acquires a knowledge of the trust, is, if he afterward becomes possessed of the trust property, bound by the trust, in the same manner as the trustee.

Where, upon the face of the title-papers, the purchaser has full means of acquiring complete knowledge of the title from the references therein made to the origin and consideration thereof, he will be deemed to have constructive notice thereof.

A co-proprietor of real property, derived under the same title as the other proprietors, is presumed to have full knowledge of the objects and purposes and trusts attached to the original purchase, and for which it is then held for their common benefit.

A purchaser by a deed of quit-claim without any covenant of warranty, is not entitled to protection in a court of equity as a purchaser for a valuable consideration, without notice; and he takes only what the vendor could lawfully convey.

A warranty, either lineal or collateral, is no bar to an heir who does not claim the property to which the warranty is attached by descent, but as a purchaser thereof.

Whether a bill in equity is open to the objection of multifariousness or not, must be decided upon all the circumstances of the particular case. No general rule can be laid down upon the subject; and much must be left to the discretion of the court.

The objection of multifariousness can be taken by a party to the bill only by demurrer or plea or answer, and can not be taken at the hearing of the cause. But the court itself may take the objection at any time—at the hearing or otherwise. The objection can not be taken by a party in the appellate court.

Lapse of time is no bar to a subsisting trust in real property. The bar does not begin to run until knowledge of some overt act of an adverse claim or right set up by the trustee is brought home to the *cestui que trust*. The lapse of any period less than twenty years will not bar the *cestui que trust* of his remedy in equity, although he may have been guilty of some negligence, where the suit is brought against his trustee, who is guilty of the breach of trust, or others claiming under him with notice.

Where exceptions are taken to a master's report, it is not necessary for the court formally to allow or disallow them on the record. It will be sufficient if it appears from the record, that all of them have been considered by the court, and allowed or disallowed, and the report reformed accordingly.

There is no principle of the common law which forbids individuals from associating together to purchase lands of the United States on joint account at a public sale.

Stanbery and Ewing, for appellants. *Pirtle and Scott*, for appellees.

Mr. Justice STORY delivered the opinion of the Court.

This is the case of an appeal from the decree of the Circuit Court of the district of Ohio, sitting in equity,—rendered in favor of the original plaintiff, and it is brought to this Court by the original defendants, who are now the appellants. The record is exceedingly voluminous, and the facts and proceedings complicated and perplexed by a variety of details. A general outline of the leading facts is given in the printed opinion of the court below, with which we have been favored; and those facts can not be more succinctly stated than they are in that summary—we shall therefore avail ourselves of it upon the present occasion. It is as follows: “In the Summer of 1817, the complainant, in connection with John H. Piatt, William M. Worthington, and Gorham A. Worth, formed an association to purchase lands of the United States, at a public sale, which was shortly to take place at Wooster, in this State—and the complainant was appointed the agent of the company, to attend the sale for that purpose.

“Another association consisting of Martin Baum, Jesse Hunt, Jacob Burnet, William C. Schenck, William Barr, William Oliver, and Andrew Mack, was formed for the same object; and William Oliver and William C. Schenck were appointed its agents to attend the sale.

“Before the sale took place, it was discovered that both companies were desirous of purchasing the same tracts of land, and the agents agreed that they would purchase tracts 1, 2, 3, and 4, at, and including the mouth of Swan Creek, in the United States Reserve, at the foot of the Rapids of the Miami; and also Nos. 86 and 87 on the other side of the river, opposite the mouth of Swan Creek, for the joint benefit of both companies; each company to have one-half of the lands purchased, and to pay at the same rate. Nos. 86 and 87 were bid off by Oliver, and the certificates of purchase issued to him. The other tracts

were bid off by the complainant, and the certificates of purchase were issued in the names of the association represented by him.

“At the same sale, the complainant, in behalf of his company, purchased the north-west quarter of section 2, township 3, the south-west quarter of the same section, the north-west quarter of section 3, township 3, and also the south-east and south-west quarters of the same section, in said reserve; and one-fourth of the purchase-money on each tract being paid, certificates of purchase were made out in the names of the company. And the other agents purchased for their company, at the same sale, other tracts of land.

“On the return of the agents to Cincinnati, their acts were ratified by both companies. One company was designated the Piatt Company, the other the Baum Company; and the union of both, in regard to the lands jointly purchased, was called the Port Lawrence Company. The joint, or Port Lawrence Company, having made their purchase with the view of laying out a town, to be called Port Lawrence, appointed Baum a trustee, and authorized him to sell lots, and do other things in relation to his agency, for the benefit of the company.

“On the 14th August, 1817, Baum appointed Oliver his attorney, to sell lots in the town to be laid out, receive the money, and give certificates of sale, in the nature of title-bonds, to the purchasers; and he, in association with William C. Schenck, was authorized to lay out the town. Baum, and also the proprietors, gave to Oliver a letter of instructions in relation to the plan of the town and the sale of the lots, etc. By the conditions of sale, one-fourth of the purchase-money was to be paid down, and the residue in three equal annual payments.

“At the sale of lots, the sum of \$855.33 was received by Schenck, for which he was to be accountable to Baum.

“At the sale, Oliver purchased lots 223 and 224, an undivided half of which he afterward conveyed to Baum, and they erected a warehouse and other improvements on them.

“In August, 1818, he sold one-half of his interest in the Port Lawrence Company to William Steele and William Lytle; and in March, 1819, he sold the residue of his interest to Micajah T. Williams, one of the defendants, and his partner Embre.

“By the reduction of the price of the public lands, and the

pressure of the times, the Port Lawrence Company were under the necessity of relinquishing to the United States, tracts 1 and 2, having agreed to pay for the same about \$20,000; and of appropriating the money paid on them to the payment in full of the residue of the tracts purchased by them, and by the Baum and Piatt Companies respectively. In pursuance of this object, the five quarter-sections purchased by the Piatt Company were assigned to Baum, the 17th September, 1821; and on the same day, tracts numbered 1, 2, 86, and 87, purchased in the name of the Piatt Company for the Port Lawrence Company; and also tracts 3 and 4, purchased by Oliver for the same company, were assigned to Baum. It is alleged that these tracts had been previously assigned to Baum, of which there is no evidence.

“On the 27th September, 1821, Baum, through his agent, Micajah T. Williams, one of the defendants, relinquished, to the United States, tracts 1 and 2. On these tracts there had been paid the sum of \$4,817.55; \$1,372.34 of this sum were applied to complete the payments on tracts 3, 4, 86, and 87, the residue of the tracts purchased at the sale by the Port Lawrence Company. From the relinquished tracts, there still remained \$3,445.21. Of this sum, one-half belonged to the Piatt Company; \$1,248 were applied to complete the payment on the five quarter-sections, which left a balance of \$474.60 still due to the Piatt Company; but which was applied in payment of lands held by the Baum Company.

“After the relinquishment of the tracts on which the town had been laid out, the purchasers of town lots claimed a return of the money paid by them, with interest, and also damages for their improvements.

“On the 10th September, 1822, Baum gave to Oliver a certificate, which stated there was due him, by the Port Lawrence Company, the sum of \$213.02, which he refunded to purchasers of lots, by the request of the company, ‘it being the amount due on the shares originally owned by John H. Piatt, Robert Piatt, G. A. Worth, and William M. Worthington.’

“And on the 27th August, 1823, Oliver having made out an account against the Port Lawrence Company, for money paid by him to purchasers of lots, and services rendered as agent, Baum admitted his account, amounting to the sum of \$1,835.47;

to secure the payment of which, Baum executed to him a mortgage on tracts 3, 4, 86, and 87. The payment was to be made, with interest, on or before the 1st of January, 1824.

"The 7th October, 1825, Oliver caused an attachment to be issued by the clerk of Monroe County, in the Michigan Territory, against Baum and the members of the Piatt Company, on the certificate of indebtedment given by Baum. This attachment was levied on four of the five quarter-sections owned by the Piatt Company, and such proceedings were had on the attachment as to obtain an order of sale of the property attached; three of the quarters were sold, by the auditors appointed, for the sum of \$241.60, to Noble, the agent of Oliver. Noble, shortly afterward, conveyed these tracts to his principal.

"A bill to foreclose the mortgage given to Oliver was filed by him in the Supreme Court of Michigan, the 13th October, 1825. And a final decree having been obtained, the mortgaged premises were sold, by the assistant register of the Chancery Court, to Oliver, the 1st September, 1828, for \$618.56.

"By the act of 20th May, 1826, the Secretary of the Treasury was authorized to select, for the benefit of the University of the Michigan Territory, a certain number of acres of the public lands within the territory; and he selected tracts 1 and 2, which had been relinquished.

"In the Summer of 1828, as appears from the report of the Committee of the Trustees of the University, Oliver, as the agent of Baum and others, proposed to exchange certain lands owned by Baum, in the vicinity of Port Lawrence, or any of the public lands subject to entry, for tracts 1 and 2, on which the town of Port Lawrence had been laid out.

"A law of Congress was passed, authorizing the exchange, the 13th January, 1830. Previous to this, Baum assigned to Oliver the final certificates for the tracts he purchased under the attachment, and also under the decree of foreclosure; and one of the quarter-sections levied on by the attachment, but not sold under it, in payment of the balance of the judgment on the attachment, which enabled Oliver to obtain patents for the same in his own name. And on his conveying to the University tracts numbered 3 and 4, except ten acres reserved of number 3, and the north-west quarter of section 2, township 3, and also the

north-west and south-west quarters of section 3, township 3, he received an assignment from the University of their right to tracts 1 and 2, for which patents were issued in the name of Oliver.

"After the exchange was effected, Baum, and the defendant Williams, each purchased an interest of one-third in tracts 1 and 2, 86 and 87. After Baum's death, in 1832, Oliver purchased his interest from his heirs. And the 1st December, 1832, Oliver conveyed to Williams an undivided half of the ten acres reserved in number 3. On the 23d May, 1834, he conveyed to him an undivided half of tracts 86 and 87, except sixty acres which had been sold to Prentiss and Tromley; and on the — day of November, he conveyed to him 'one undivided half of lots 1 and 2, on which Port Lawrence was laid out,' together 'with a like interest in all sales and improvements thereunto belonging.'

"Oliver, Baum, and Williams, agreed to lay out the town of Toledo on the site of Port Lawrence, and to make titles to the Port Lawrence purchasers of lots, on their complying with their contracts.

"Some years after this, Oliver purchased from the Michigan University the tracts of land he conveyed to it in exchange for tracts 1 and 2.

"Of the Piatt Company, John H. Piatt is deceased, and his administrators and heirs are made parties to this suit. William M. Worthington assigned one-half his interest in the Port Lawrence Company, and it is claimed and represented by John E. Worthington. The interest of Worth has been assigned to the defendant Ewing, who also claims the entire interest of Baum, Mack, Barr, Burnet, and half the interest of the complainant.

"Of the Baum Company, Martin Baum, Jesse Hunt, William C. Schenck, and William Barr, are deceased."

Such is a general outline of the leading facts. There are others which may be required to be adverted to in the progress of this opinion; but there are many details which must necessarily be passed over in silence, as they would tend to embarrass the discussion of the main questions in the cause, and obscure rather than illustrate the merits thereof.

The object of the bill is to subject the tracts No. 1 and No. 2, now constituting the site of the town of Toledo, formerly

known as Port Lawrence, to the rights of the Port Lawrence Company, composed, as we have seen, of the Piatt Company and the Baum Company, and those who claim under them, now in the possession of Oliver and Williams, under a title derived from the grant of the Michigan University, upon the ground that a trust has attached to those tracts in favor of the Piatt and Port Lawrence Companies, under the circumstances which will be presently stated. These circumstances are, that the lands given in exchange to the Michigan University, for tracts No. 1 and No. 2, under the negotiation with the University, were, at the time, the property of the Piatt and Port Lawrence Companies, as *cestui que trust* thereof; that the facts were at the time well known to Baum and Oliver and Williams, and consequently that the trust by operation of law attached thereto in the hands of those parties. To this conclusion several objections have been taken by the counsel for the appellants. In the first place, that no such trust attached to the lands so given in exchange to the Michigan University, at the time of the transfer, and consequently none to tracts Nos. 1 and 2, taken in the exchange. In the second place, that if it did, as Oliver afterward repurchased the exchanged lands from the University, and Oliver and Williams under him now hold some parts thereof, the trust is revived, and has reattached to these lands, and thus has displaced any supposed trust upon tracts Nos. 1 and 2, at least *pro tanto*. In the next place, that Oliver and Williams are purchasers without notice of the trust, or of any misapplication of the trust property by the trustee.

Before proceeding to the considerations applicable to the first and third points, it may be well to dispose of that which grows out of the second point, as it involves a most important principle in equity jurisprudence. It is a clearly established principle in that jurisprudence, that whenever the trustee has been guilty of a breach of the trust, and has transferred the property, by sale or otherwise, to any third person, the *cestui que trust* has a full right to follow such property into the hands of such third person, unless he stands in the predicament of a *bona fide* purchaser, for a valuable consideration, without notice. And if the trustee has invested the trust property, or its proceeds, in any other property into which it can be distinctly

traced, the *cestui que trust* has his election either to follow the same into the new investment, or to hold the trustee personally liable for the breach of the trust. This right or option of the *cestui que trust* is one which positively and exclusively belongs to him, and it is not in the power of the trustee to deprive him of it by any subsequent repurchase of the trust property, although in the latter case the *cestui que trust* may, if he pleases, avail himself of his own right, and take back and hold the trust property upon the original trust; but he is not compellable so to do. The reason is, that this would enable the trustee to avail himself of his own wrong; and if he had made a profitable investment of the trust fund, to appropriate the profit to his own benefit, and by a repurchase of the trust fund to charge the loss or deterioration in value, if any such there had been, in the mean time, to the account of the *cestui que trust*—whereas the rule in equity is, that all the gain made by the trustee, by a wrongful appropriation of the trust fund, shall go to the *cestui que trust*, and all the losses shall be borne by the trustee himself. The option, in such case, to take the new or the original fund is, therefore (as has already been suggested), exclusively given to the *cestui que trust*, and is given to him for the wisest purposes and upon the soundest public policy. It is to aid in the maintenance of right and in the suppression of meditated wrong. Many cases on this subject will be found collected in the elementary writers. See 2 Sugden on Vendors, ch. 14, sec. 3, p. 148, etc., 9th edit.; 2 Story Eq. Jurisp., sec. 1258 to sec. 1265, 3d edit.; Com. Dig., *Chancery*, 4 W. 25, to 4 W. 28; and the rule will be found fully discussed and recognized in *Ryall v. Ryall*, 1 Atk. 59; *Lane v. Dighton*, Ambler, 409; *Lench v. Lench*, 10 Vesey, 511; and *Docker v. Somes*, 2 Mylne & Keen, 655; in many of its important bearings. Lord ELLENBOROUGH, in the case of *Taylor v. Plumer*, 3 Maule & Selw. 562, examined and confirmed the doctrine in its application to cases at law, and cited and approved the decisions in equity; so that it is plain upon authority, and the same would be equally true upon principle, that if the tracts Nos. 1 and 2 were purchased with the trust fund belonging to the Piatt and Port Lawrence Companies, the latter are at full liberty to follow the same into the hands of any persons not being *bona fide* purchasers for a valuable

consideration without notice, and the circumstance that there has since been a repurchase of the original trust property by Oliver, does not in any manner affect, or control, or vary, the right or option of the *cestui que trust*. The case is not like that put at the bar, where a part of the funds of the *cestui que trust* have been mixed up with other funds exclusively belonging to the trustee in the new purchase or investment. In such a case there may be ground to hold the trust funds in charge *pro tanto* therein. Here, the whole consideration of the purchase was a fund wholly and exclusively belonging to the *cestui que trust*, if they have made out any title at all, which we shall hereafter consider.

Let us then proceed to the consideration of the other questions above stated. And the first is, whether at the time of the exchange with the Michigan University, the lands given in exchange for tracts Nos. 1 and 2, were, in the hands of the party or parties making that exchange, affected with any trust such as has been already suggested? And this leads us to the consideration of the antecedent state of facts between the parties to this record.

We have seen that the original purchase of tracts Nos. 1, 2, 3, and 4, and Nos. 86 and 87, was made for the account and benefit of the Port Lawrence Company; and the object of the purchase was to lay out a town thereon, and to sell the lots to purchasers. Baum was appointed a trustee and agent for this purpose, and he was to make sale of the lots and conduct the other affairs of the agency. With the consent of the company, in August, 1817, he employed Oliver as a sub-agent, who received instructions from the company in relation to the plan of the town (which he was to lay out in conjunction with William C. Schenck) and the sale of the lots. This agency of Oliver, under Baum, was originally (as it should seem) limited to one year, but it was certainly continued, if not for all, at least for some purposes, to a much later period. In August, 1818, Oliver sold one-half of his interest in the Port Lawrence Company to Steele and Lytle, and in March, 1819, he sold the residue to the defendant Williams, and his partner Embre. And these facts are most important to be borne in mind, since they clearly establish that Oliver, as an original proprietor, and Williams, as

a derivative proprietor, under Oliver, in the Port Lawrence Company, had full and complete notice of the nature and objects of the original purchase by that company, and of the trust and agency of Baum in accomplishing those objects. In truth, the laying out of a town on those tracts, and the sale of the lots, seems to have been an enterprise always cherished by some of the company with uncommon solicitude and sanguine expectations of profit.

In consequence of the reduction of the price of the public lands by Congress, and the pressure of the times, the Port Lawrence Company found themselves compelled, in 1821, to relinquish a part of their tracts to the Government. For this purpose they assigned all the four tracts to Baum, in September, 1821; and the Piatt Company at the same time assigned to Baum their five quarter-sections; and he, through the defendant Williams, thereupon relinquished tracts Nos. 1 and 2, to the United States, and the return purchase-money was applied *pro tanto* to complete the payments due on the other tracts (Nos. 3 and 4, and Nos. 86 and 87), and the residue was applied partly to pay the balance due on the five quarter-sections, purchased by the Piatt Company, and partly to pay a balance due on other lands purchased by the Baum Company.

Pausing here, for a moment, it is apparent that the original trust created in tracts Nos. 1 and 2, under the agency and assignment to Baum, for the benefit of the Port Lawrence Company, was, by this relinquishment to the Government, entirely displaced and extinguished. These tracts afterward, in the Summer of 1828, under the act of 20th of May, 1826, were selected by the Secretary of the Treasury for the Michigan University, and certainly came into the possession of the latter discharged of the trust. Still, however, it is obvious from the papers in the cause, that in the intermediate time between the relinquishment of these tracts and the grant thereof to the University, the original plan of establishing a town on the site, remained a favorite project of Baum as agent of the Port Lawrence Company, and he made strenuous efforts, by applications to Congress and to the General Land-office, to reacquire the title thereof, not for himself alone, but, as his applications and letters show, on behalf of himself and his associates. He constantly held

himself out as acting for the benefit of the concern; and there is every reason to suppose, that some, if not all, of his associates were lulled into security, and contemplated, if he should be successful, to resume the original plan. This may serve in some measure to explain their inactivity, and to show that they continued to place unlimited confidence in Baum, that all his proceedings would be for their benefit, and not for his own sole advantage. Baum petitioned Congress on the subject as early as January, 1822, and in his letter to Mr. Brown (a senator in Congress), of the 25th of December, 1822, inclosing a duplicate of his petition, he says: "Inclosed is the petition signed by myself only, still others have an interest in it;" and he names in the letter, and its postscript, Williams, Piatt, and others. In another letter to the same senator, dated the 6th of February, 1823, he says: "The tracts purchased by myself and associates in that quarter, those retained and relinquished, can be ascertained in the land-office." In another letter addressed to the Commissioner of the General Land-office, as late as the 27th of July, 1827, he says: "In consequence of the President's proclamation, announcing the sales of lands, I attended, at Delaware, on the 9th instant, but was much disappointed to find there instructions of the General Land-office, to withhold from sale all lands situate north of the line which divided the state of Ohio and the Michigan territory, for I went there for the express purpose of repurchasing tracts Nos. 1 and 2, in the Maumee reservation, which I formerly owned and which I have relinquished." He adds: "These lands, though bought in sundry persons' names, were afterward transferred to me as agent, for the purpose of managing and conveying them in case of sales." In the same letter he protests against the trustees of the Michigan University having a grant of these tracts, as they have no claim to the same, and that he has a strong claim upon the Government.

To repel the inferences deducible from these facts, it is said that the testimony of Carneal establishes that Piatt attended that very sale at Delaware for the purpose of buying these tracts, not for the Port Lawrence Company, but for another company consisting of Colston, Carneal, and himself; and that Baum also attended on his own account, and not for the Port Lawrence Company. Of transactions of this nature, after such a lapse of

time, it is perhaps not easy to ascertain all the facts which then regulated the conduct of the parties, when they depend upon the frail recollections of witnesses. It is quite possible that the circumstances might have been explained, and nothing have been intended by either party really injurious to the interests of the Port Lawrence Company. But as no sale took place of these tracts upon that occasion, the only effect which can be properly attributed to the testimony, admitting it in its fullest latitude, is, that it weakens our confidence in Piatt's own conduct, and diminishes the force of the inference as to Baum's then acting as an agent for the Port Lawrence Company. But the written statements of Baum in the letters above cited are evidence of his intentions and acts, of a far higher character, which the lapse of time has not obscured or varied, and those letters are, as to himself, most conclusive to show that he did not deem himself as acting for his own interest alone, but for that of his associates also, in his whole proceedings to reacquire those tracts.

As soon as the Michigan University had obtained a title to tracts Nos. 1 and 2 (in the Summer of 1828), Oliver, avowedly on behalf of Baum, made an application to the trustees of that University for an exchange of those tracts for other tracts in the vicinity. These negotiations were begun as early as the 12th of August, 1828, and various propositions were made and negotiations were had by the trustees and Oliver, as agent of Baum, between that time and the 4th of January, 1831, when, the consent of Congress having been obtained for the exchange, by an act approved on the 13th of January, 1830, the University agreed to make the exchange; and accordingly, by their deed, dated the 7th day of February, 1830, did convey their right and title to tracts Nos. 1 and 2 to Oliver in fee-simple, in consideration of receiving a deed from Oliver of certain tracts, containing seven hundred and sixty-seven and a half acres, viz.: the whole of tracts Nos. 3 and 4, the south-west quarter of section 2, and the west half of section 3; the tracts being part of the purchase of the Port Lawrence Company, and the quarter and half-sections being part of the purchase of the Piatt Company, in 1817. We thus trace the trust property home to the Michigan University, as obtained by a conveyance from and under Baum

and Oliver in pursuance of a negotiation, avowedly made by Oliver on behalf and as agent of Baum, as the sole consideration of the grant of Nos. 1 and 2 to Oliver by the University.

And this conducts us to the consideration of that which is the main hinge on which the present case turns; that is, whether the tracts so conveyed by Oliver to the University were at the time affected with the trust in favor of the Piatt and Port Lawrence Companies, with which they were originally chargeable in the hands of Baum. This necessarily involves a review of the title of Oliver to the tracts (the three quarter-sections) belonging to the Piatt Company under the attachment proceedings in Michigan, and also of his title under the mortgage of tracts Nos. 3 and 4, and Nos. 86 and 87, belonging to the Port Lawrence Company, and the foreclosure thereof,—in connection with the subsequent acts of Baum and Oliver in the premises. Unless the title thus derived is beyond all legal exception (*omni exceptione major*) as an adverse and unimpeachable title, it is plain, that the original trust attached at the time of the exchange to the tracts so conveyed, and consequently (as has been already suggested) it was, at the option of the *cestui que trust*, transferable and transferred to tracts Nos. 1 and 2. For it is, in our judgment, beyond all question, that Oliver at the time of the exchange had full notice of the trust and title originally invested in Baum, and that his acts in making the exchange are to be deemed the acts of Baum, and affected by the same considerations as if personally transacted by Baum himself, and were designed by mutual consent to promote the contemplated objects and interests of both.

And, first, let us review the proceedings under the attachment. In September, 1822, Baum gave a certificate to Oliver, stating that a debt of \$213.02 was due to him from the Port Lawrence Company for money refunded to purchasers of lots at the request of the company, "it being the amount due on the shares originally owned by John H. Piatt, Robert Piatt, G. A. Worth, and William M. Worthington." These persons constituted the Piatt Company; and consequently the claim thus asserted was a subdivision of a debt confessedly due from the Port Lawrence Company, in which the Piatt Company had a moiety of the interest only. Whether Baum had, in virtue of

his general agency, the right to give such a certificate, thus severing a joint debt, so as to be binding upon the Piatt Company alone, without their consent, and whether this certificate was *bona fide* given under justifiable circumstances, it is unnecessary to consider, although the transaction is certainly open to some observation in point of authority as well as propriety in the then unliquidated concerns of the Port Lawrence Company. Assuming, however, the transaction to have been perfectly correct and binding in all respects, let us examine the subsequent proceedings consequent thereon. Upon this certificate Oliver, in October, 1823, instituted a suit by attachment in Monroe County, in the territory of Michigan, against Baum, Robert Piatt, G. A. Worth, and William Worthington (John H. Piatt being then deceased), alleging them to be joint partners and survivors, and all residing out of the territory—upon which four of the quarter-sections of land owned by the Piatt Company in that county were attached. At the October term, 1826, of the same court, judgment was obtained by default against all the defendants, no appearance having been entered for them; and upon the execution issuing thereon, three of the four sections (those which were afterward conveyed to the Michigan University) were sold, and bid off by an agent of Oliver, and were afterward conveyed by him to Oliver. Of this suit there is no pretense to say that any of the defendants, except Baum, had any notice, if indeed he had any, although some of them resided in the same state where Oliver resided, and one of them in a neighboring state, at no great distance, who was known to be a man of large property. The other members of the Port Lawrence Company were not made parties to the suit. It was brought in a distant territory, almost then a wilderness, more than two hundred miles from the residence of the defendants; and if it had been the design of Oliver to procure a judgment against the parties, without any notice to them, which should be obligatory upon them, and to give Oliver a good title to the lands at a comparatively trivial price, better means could scarcely have been devised to accomplish the purpose. For the institution and consummation of this suit behind the backs and without the knowledge of the parties in interest, no better excuse can now be found than that Oliver did not choose to institute a suit

against them at home, as it might give them offense and break up some former ties of acquaintance. How far such an excuse is admissible, we do not stop to inquire. It rather tends to cast a shade upon the transaction than to vindicate it. But what was the title thus acquired, supposing all the proceedings to be *bona fide*? It was a mere naked title in equity to the tracts, the title to which still remained in the United States; and the legal title could not be consummated, unless the certificates of the purchase and payments for the tracts were first surrendered to the United States. Those certificates were then in the hands of Baum, as trustee of the Piatt Company; and he had no right under the circumstances to assign or surrender those certificates to Oliver to enable him to make his title available at law, without the express consent of the Piatt Company. If he had refused, Oliver could not have obtained them, unless upon a bill in equity to which all the proprietors should be made parties, and in which they would have been at full liberty to examine into the validity and merits of the original claim of Oliver, on which his attachment was founded, and also into the regularity and *bona fides* of the transactions in and under the suit. Yet Baum, in December, 1828, assigned and surrendered up these certificates to Oliver, and thus enabled him to consummate his title and reduce it to a legal title, by obtaining a patent, without any such consent; and in so doing he was guilty of a manifest breach of trust, of which Oliver can not now be permitted to pretend ignorance. It is also a fact of no small significance, that the surrender of these certificates was contemporaneous with the surrender to Oliver of the certificates of tracts Nos. 3 and 4; and subsequently, in December, 1829, a like surrender of Nos. 86 and 87, belonging to the Port Lawrence Company, under the foreclosure of the mortgage, which we shall have occasion to review; and that all this was done pending the negotiations with the Michigan University by Oliver on behalf of Baum for the exchange.

This view of the matter releases us from no small doubt and difficulty in relation to an argument pressed at the bar with great earnestness; and that is, whether such an equity was attachable and vendible under the attachment law of Michigan. There is great difficulty in maintaining the affirmative, for the

reasons stated in the opinion of the learned judge in the court below; and especially if, as has been suggested, the act is but a transcript of an act of New Jersey, and the courts of that State have, as has been asserted at the bar, held no such equity attachable.

Then, as to the mortgage and the proceedings under it. The mortgage was given upon tracts Nos. 3 and 4, and Nos. 86 and 87, by Baum to Oliver, in August, 1823, upon an account then adjusted between him and Oliver against the Port Lawrence Company (and which does not appear ever to have been examined or sanctioned by the company itself) for a balance of \$1,835.47, then supposed to be due to him for money paid and services rendered by him as agent of the company. In October, 1825, a bill was filed in the Supreme Court of Michigan (within which these tracts were situate) to foreclose the mortgage; and such proceedings were had upon this suit, that, in September, 1828, the tracts were sold, and at the sale bought by Oliver for the sum of \$618.56, and a deed of conveyance thereof was accordingly made to him. To this suit Baum alone was made a party; none of the other proprietors of the Port Lawrence Company being made parties, although Oliver knew perfectly well who they were, and that Baum was merely their trustee, and that they were the *cestui que trust*, possessing the beneficial interest in the premises. Under such circumstances, to allow the foreclosure to stand, so as to conclude the rights of the *cestui que trust*, would be a violation of all the doctrines of courts of equity upon this subject. The decree must be treated, as to them, as wholly inoperative and void.

But there is another view of the matter, which is conclusive. The mortgage was of a mere equity, the legal title being still outstanding in the United States; and supposing that this equity could have been foreclosed in such a suit (which, considering the defect of the real parties in interest, it clearly could not), still it was a naked equity, which could be made available to obtain a legal title from the United States, only by an assignment and surrender of the certificates of the purchase and payments, then held by Baum for the benefit and use of the Port Lawrence Company. And here, again, the same considerations apply, which have been already suggested. Oliver could not obtain an assignment

and surrender of those certificates, except by a bill in equity against Baum, to which the other proprietors in the Port Lawrence Company must have been made parties, as they were necessary parties; and thus the whole merit of the mortgage and foreclosure must have been brought directly before the court for adjudication. Yet Baum, without any consultation with or assent of those proprietors, assigned and surrendered the certificates of those tracts also to Oliver, and thus enabled him to obtain a patent therefor from the United States, in subversion of their rights and his duty. This was a gross breach of trust, and was done (let it be repeated) in December, 1828 and 1829, pending the negotiations with the Michigan University, obviously for the purpose of enabling Oliver in his (Baum's) name, and on his behalf, to consummate the exchange. And, finally, when the negotiation was consummated by means of these very certificates, Oliver, with the consent of Baum, was enabled to obtain a patent therefor, on the 4th of March, 1831.

Very soon after the patent was so obtained, viz., on the 16th of May, 1831, we find that Baum, Oliver, and Williams entered into a written agreement, by which Oliver purported to sell, in fee-simple, to Baum and Williams, each one-third part of the tracts Nos. 1 and 2, and Nos. 86 and 87, with the exception of sixty acres out of No. 86; and they were to receive a quit-claim deed therefor from him accordingly, for the sum of \$1,555 for each third part. The parties farther agreed to lay out a town upon the old site, with some change of the plan, and to bring the lots into the market for sale; and they were to contribute to the charges and expenses according to their respective interests. After the death of Baum, Oliver purchased his share of the tracts from his heirs; and by certain deeds of quit-claim, executed in December, 1832, in May, 1834, and in November, 1834, Oliver conveyed one-half of the premises to Williams.

Now, looking at these transactions together, it seems almost impossible to escape from the conclusion, that Baum and Oliver had a mutual interest in the negotiation with the Michigan University; that it was not only carried on in the name of Baum, and apparently for his account, but that Oliver acted as his agent throughout; that the deed from the University was made

directly to Oliver, with the consent of Baum; that the assignment and surrender of all the certificates by Baum, to Oliver, was for the express purpose of enabling Oliver to complete the bargain with the University; and that the agreement between Baum, Oliver, and Williams, which followed almost immediately upon the grant of the patent, was made in pursuance of a prior understanding between all the parties, and was but a consummation of the objects originally contemplated by Baum and Oliver, from the period of their first negotiation with the University down to the time of the execution of that agreement. And all this was done by Baum and Oliver, without the knowledge or consent or approbation of the Piatt and Port Lawrence Companies, and was never sanctioned by them. Under such circumstances, what is the true duty of a court of equity? It is, to hold the parties engaged in these transactions, with full notice of the title and the trust in Baum, bound by that trust, and to enforce that trust against the tracts Nos. 1 and 2, so far as they remain in their hands unaffected by the rights of purchasers under them, *bona fide* for a valuable consideration, without notice. In our judgment, no reasoning can make the proposition more clear than a simple recital of the facts, and the statement of the general doctrine of equity jurisprudence that the *cestuis que trust* have an option to follow their property, or its proceeds, into any other property into which it has been converted by a breach of the trust, subject only to the rights of such purchasers as have been just referred to. Indeed, the question, as against Baum and Oliver, seems absolutely closed by the state of the evidence; and their intimate knowledge of the whole concern requires neither illustration nor commentary.

Let us, then, proceed to the consideration of the case as to Williams. It is said that he stands in the predicament of a *bona fide* purchaser for a valuable consideration, without notice; and if he does, he is certainly entitled to protection. Williams, in his answer, asserts himself to be such a purchaser, but it is difficult to maintain that averment in its just legal sense, looking to all the circumstances of the case. In 1819, he became a purchaser of one-half of the interest of Oliver in the Port Lawrence Company, and, as such, he could not fail to know that tracts Nos. 1 and 2, 3 and 4, and Nos. 86 and 87, belonged to that

company; and he has never ceased to be a member of that company. In 1821, he was employed by Baum, the acknowledged trustee and agent of the company, to surrender tracts Nos. 1 and 2 to the Government of the United States; and through him the relinquishment took place. He says that he did not know of the negotiation between Oliver and the University, for an exchange of the lands, until after its consummation, and never heard of the details of said negotiations, nor what lands were given in exchange, except parts of tracts Nos. 3 and 4. Now, these very tracts belonged to the Port Lawrence Company, so that he was necessarily put upon the inquiry by what means Baum had parted with them, and Oliver had become possessed of them. Besides, in his negotiation and surrender of tracts Nos. 1 and 2 to the Government, and the apportionment of the funds arising from the relinquished lands, first to the remaining lands of the Port Lawrence Company, and then to the lands respectively purchased by the Piatt and Baum Companies, he necessarily became acquainted with the relative interests of all these companies therein. The origin and title of the Michigan University to the tracts Nos. 1 and 2, and the exchange thereof with Oliver, were matters of public notoriety, and proclaimed in the acts of Congress under which the exchange was made. The deed from the University to Oliver recited the material facts respecting the lands given in exchange, and referred to the records of the antecedent negotiations; and the patent itself, from the Government, of tracts Nos. 1 and 2, referred to the deed of Oliver to the University, of the lands given in exchange; so that it is most manifest that Williams, as a proprietor in the Port Lawrence Company, and as agent thereof in the relinquishment above referred to, and as a purchaser under Oliver, not only had the most ample means of knowing the nature and character and extent of the title of Oliver to the lands under consideration, but he was positively put upon inquiry in relation to the whole matter. If, under such circumstances, he chose to remain in indolent ignorance or indifference to the title, it was a voluntary ignorance and indifference, which ought not to be permitted to avail him against the rights of the *cestuis que trust*. If we add to this the fact that within two months after the patent was obtained by Oliver, he and Baum united in an agreement with

Oliver, by which each was to take a third part in the tracts Nos. 1 and 2, and Nos. 86 and 87 (these tracts never having been relinquished by the Port Lawrence Company to the Government), to be laid out as a town, and the lots sold on joint account, it would seem almost incredible that he should not have made some inquiries on the subject. And the only reasonable conclusion seems to be, that he was in as full possession of all the facts as were his partners Oliver and Baum. Another significant circumstance is, that this very agreement contained a stipulation that Oliver should give a quit-claim deed only for the tracts; and the subsequent deeds given by Oliver to him accordingly were drawn up without any covenants of warranty, except against persons claiming under Oliver, or his heirs and assigns. In legal effect, therefore, they did convey no more than Oliver's right, title, and interest, in the property; and under such circumstances, it is difficult to conceive how he can claim protection as a *bona fide* purchaser, for a valuable consideration, without notice, against any title paramount to that of Oliver, which attached itself as an unextinguished trust to the tracts.

And here, in our judgment, the merits of the case would seem to be brought to a close. But certain objections have been made to the right of the plaintiff to maintain the bill upon other collateral grounds. In the court below an objection was taken, by way of plea, that the original agreement of the Piatt and Baum Companies, in regard to the purchases of these tracts at the public sale in 1817, was an illegal combination in fraud of the rights of the United States, and therefore it makes the whole purchase an utter nullity. This objection was fully answered in the opinion of the Circuit Court, in which, on this point, we fully concur. It has been abandoned by the learned counsel here; and, indeed, in our opinion, properly abandoned, as unmaintainable in point of fact as well as law.

Another objection is to the lapse of time (*a*). The mere lapse

(*a*) Acquiescence, which is merely inaction, is the very thing which the statute contemplates as creating the limitation which cuts off the right, *Bower v. Earl*, 18 Mich. 373. This case was decided in 1869.

The laches which will bar a legal title will bar equity, even in case tainted by fraud, *Bond v. Hopkins*, 1 Sch. & Lef. 429. Twenty years bars in equity as

of time constitutes of itself no bar to the enforcement of a subsisting trust; and time begins to run against a trust only from the time when it is openly disavowed by the trustee, who insists upon an adverse right and interest, which is fully and unequivocally made known to the *cestui que trust*. Now, until 1831, no

in law, *Chalmondely v. Clinton*, 2 Jac. & Walk. 139; *Stackhouse v. Barnston*, 10 Vesey, 467.

Gifford v. N. J. R. R. Co., 2 Stockton's Ch. R. 171. Twenty years' acquiescence by owner of stock in a bridge company in a certain use of the bridge, held to estop him from enjoining such use.

Birch v. Funk, 2 Metcalf, 544. Held, that a suit forty-five years after guardianship, and twenty-five years after arriving at full age, by wards against guardian, is *stale*, and will not be sustained. On another petition showing coverture until perhaps a few years' of filing a second petition, and alleging fraud on part of guardian in concealing the fact that there was property—held good, and suit well brought.

Twenty-five years' lying by, held binding, *Blannerhasset v. Day*, 2 Ball & B. 128. Eighteen years held the same, *Gregory v. Gregory*, Coop. 201.

Wallett v. Collins, 10 How. 186, suit to set aside conveyances by heirs arriving at age in 1834. Case decided in 1850, and held that absence from state, and discovery in 1838 of the fraud, sufficient to account for the delay. Plaintiff was young and ignorant of his right when he gave the deed, which, sixteen years after he became of age, was set aside.

In *Barwell v. Barwell*, 34 Beavan, 375, it was held that after twenty years' delay or acquiescence, relief could not be granted in a case of *doubtful trust*, or, in other words, where it was doubted that any trust ever existed.

The sale of a reversionary interest in real estate sustained where there was a fair price given, after TWENTY-TWO years' acquiescence, *Lord v. Jeffkins*, 35 Beavan, 7.

The sale of a reversionary interest set aside after over eighteen years of acquiescence. A partial confirmation was made during the intermediate time, *St. Alban v. Harding*, 27 Beavan, 11.

In *Williams v. Champion*, 6 Ohio, 169, *lapse of time*, which is another name for *acquiescence*, was set up as the defense. By the court: "Lapse of time never extinguishes the rights of the parties merely as lapse of time. It does so when a time for doing an act is fixed, and the party to whom it is to be performed forthwith evinces his intention to put an end to the agreement so soon as the failure to perform, at the time fixed, has occurred."

These authorities plainly indicate that the true rule of ACQUIESCENCE is:

1. Merely as such, no time short of the period limited by the statute of limitations, will bar.

2. That "equity follows the law," and that the subject-matter of the suit is considered in fixing the proper rule as to the time within which suit should be brought.

3. That when *acquiescence* bars the action, it ceases so to be, and becomes an *election* to allow the trustee to hold, or a *confirmation* of his acts, or an *estoppel* intervenes.

See further hereinafter the cases where suits in equity are brought for the recovery of real estate.—EDITOR.

final overt act was done by Baum in violation of his duty as trustee; and the first and great breach of that duty, on his part, was the surrender of the certificates of the tracts to Oliver at different periods between 1828 and 1831. At what particular period the subsequent acts of Baum, Oliver, and Williams became first known to the plaintiff and the other proprietors of the Piatt and Port Lawrence Companies having the same interest, does not distinctly appear; but the facts could not have been fully known or understood until within a few years before the filing of the bill, and at most probably not exceeding eight or ten. That period, upon admitted principles, is far too short to interpose any positive bar to relief in equity. There may have been an unjustifiable delay, and gross inattention on the part of some of the proprietors. But as against persons perfectly connusant of the trust, it can furnish no ground for any denial of the relief which the case otherwise requires.

Another objection urged at the argument is, that the bill is multifarious in uniting the trust property owned by the Piatt Company and the Port Lawrence Company in one bill, as the interests of each are separate and distinct in the tracts conveyed by Oliver to the Michigan University. We are of opinion that the bill is in no just sense multifarious. It is true that it embraces the claims of both the companies; but their interests are so mixed up in all these transactions, that entire justice could scarcely be done, at least not conveniently done, without a union of the proprietors of both companies; and if they had not been joined, the bill would have been open to the opposite objection that all the proper parties were not before the Court, so as to enable it to make a final and conclusive decree touching all their interests, several as well as joint. It was well observed by Lord COTTENHAM in *Campbell v. Mackay*, 1 Mylne & Craig, 603, and the same doctrine was affirmed in this Court in *Gaines and wife v. Relf and Chew*, 2 How. 619, 642, that it is impracticable to lay down any rule as to what constitutes multifariousness, as an abstract proposition; that each case must depend upon its own circumstances; and much must necessarily be left, where the authorities leave it, to the sound discretion of the court (a). But,

(a) See also Story Eq. Plead., sec. 530 to sec. 540, and the authorities there cited. *Attorney-General v. Crolock*, 3 Mylne & Craig, 85.

if the objection were tenable (as we are of opinion it is not), it would be quite too late to insist upon it. The objection of multifariousness can not, as a matter of right, be taken by the parties, except by demurrer, or plea or answer; and if not so taken, it is deemed to be waived. It can not be insisted upon by the parties even at the hearing in the court below, although it may at any time be taken by the court *sua sponte*, wherever it is deemed by the court to be necessary or proper to assist it in the due administration of justice. And at so late a period as the hearing, so reluctant is the court to countenance the objection, that, if it can get on in the cause to a final decree without serious embarrassment, it will do so, disregarding the fault or error, when it has been acquiesced in by the parties up to that time. *A fortiori*, an appellate court would scarcely entertain the objection, if it was not forced upon it by a moral necessity. There is no pretense to say that such is the predicament of the present cause in this Court.

Another objection taken at the argument is, that Baum's heirs can not insist upon any title to the property in question, because they are bound by the warranty of their ancestor in the conveyance thereof to Oliver. But this objection has no foundation whatsoever in law, whether the warranty be lineal or collateral; for the heirs here do not claim any title to the property by descent, but simply by purchase; and it is only to cases of descent that the doctrine of warranty applies. For this it is sufficient to cite Litt. sec. 735; Co. Litt. 365; Com. Dig. *Guaranty*, I. 2, and Bac. Abridgment, *Warranty*, G, H, I, L. The fact, therefore, that assets descended upon Mary P. Ewing, one of the children and heirs of Baum, can have no influence upon the right of her husband or herself to enter the land in controversy by purchase, however it might repel their right to take it by descent.

Another objection suggested at the argument was the difficulty of apportioning the respective interests of the *cestuis que trust* in the tracts Nos. 1 and 2. But this difficulty has been overcome; and it constitutes no matter of difference between the Piatt and the Port Lawrence Companies, so far as their own interests are concerned, as distinguished from that of Oliver and Williams.

As to the report of the master and the exceptions thereto in the court below, although those exceptions were not formally overruled or allowed, yet it is plain that in the final decree they were all disposed of, some being allowed and others disallowed; and no argument has been addressed to us upon the present occasion, which points out any specific errors, which require correction beyond those which have been already incidentally hinted at.

We pass over some other objections, which were suggested at the argument, without remark, as this opinion has already been protracted to an unusual length. We need only say, that we see nothing in those objections which requires us to reform the decree of the court below.

Upon the whole, the decree of the Circuit Court is affirmed, with costs.

ANTOINE MICHOD, AND OTHERS, v. PERRONNE BERNARDINE GIROD, AND OTHERS.

[This case was decided by the Supreme Court of the United States at its January Term, 1846, Associate Justice JAMES M. WAYNE delivering the opinion. The Court was composed as stated on preceding page 18, except LEVI WOODBURY succeeded JOSEPH STORY, deceased, as Associate Justice. Reported in 4 Howard, 503.]

A person can not legally purchase on his own account that which his duty or trust requires him to sell on account of another, nor purchase on account of another that which he sells on his own account. He is not allowed to unite the two opposite characters of buyer and seller.

A purchase, *per interpositam personam*, by a trustee or agent, of the particular property of which he has the sale, or in which he represents another, whether he has an interest in it or not, carries fraud on the face of it.

This rule applies to a purchase by executors, at open sale, although they were empowered by the will to sell the estate of their testator for the benefit of heirs and legatees, a part of which heirs and legatees they themselves were.

A purchase so made by executors will be set aside.

The decisions of the courts of several States, upon this subject, examined and remarked upon.

Relaxations of this rule of the civil law, which were made in some countries of Europe, were not adopted by the Spanish law, and of course never reached Louisiana. Nor were those relaxations carried so far as to allow a testamentary or dative executor to buy the property which he was appointed to administer.

The maxims and qualifications of the civil law, upon this point, examined.

Although courts of equity generally adopt the statutes of limitation, yet, in a case of actual fraud, they will grant relief within the lifetime of either of the parties upon whom the fraud is proved, or within thirty years after it has been discovered or become known to the party whose rights are affected by it.

Within what time a constructive trust will be barred must depend upon the circumstances of the case, and these are always examinable.

Acquittances given to an executor, without a full knowledge of all the circumstances, where such information had been withheld by the executor, and menaces and promises thrown out to prevent inquiry, are not binding.

THIS case was brought up by appeal from the Circuit Court of the United States, for the Eastern District of Louisiana, sitting as a court of equity.

The widow Pargoud and others, defendants in this Court, were complainants in the court below, and obtained a decree in their favor, from which the other parties appealed. They alleged, that a series of fraudulent transactions occurred, commencing in 1813, by which they had been deprived of their fair share of the estate of Claude François Girod, whose heirs they were, and that the chief agent in this fraud was Nicholas Girod, a brother of the deceased Claude François Girod, and also a brother of some of the complainants, and relative of the rest.

Claude François Girod was a resident of the parish of Assumption, in the State of Louisiana, and died in the month of November, 1813, leaving a last will and testament, dated on the 30th of November, 1812, and a codicil, dated on the 4th of November, 1813, which will was admitted to probate, with the codicil, on the 8th of November, 1813. He never was married, and left eight brothers and sisters, and the children of a predeceased sister. These surviving brothers and sisters, with the exception of Jacques, otherwise called Jacques Antoine Girod (who was excluded by the terms of the will), were the legal heirs of the deceased Claude François Girod, each for the one-eighth part of his estate and the succession; and the heirs and legal representatives of the said predeceased sister, the legal heirs by representation of their deceased mother, for the remaining eighth part of the estate.

The proceedings in the case were exceedingly complicated. There was a bill, and an amended bill, and a supplemental bill, and another amended bill, and then another amended bill.

Instead of pursuing the case through all these details, the simplest course will be to state the charges in the bill, and the documents brought forward to sustain them.

The will of Claude François Girod was as follows :

"I, Claude François Girod, the legitimate son of François Silvestre Girod, deceased, and of the late François, born Dubois, native of Thône, in Savoy, diocese of Geneva, province of France, and now a resident of the parish of Assumption, on Bayou Lafouche, in the state of Louisiana, being about sixty years of age, and desirous to die in the Roman Catholic and Apostolic religion, under which I have ever lived, with a firm belief in the mysteries of our holy religion, do ordain this my last will or testament, in case I should be overtaken by death, the hour of which I am uncertain of; and as it behooves all living beings to settle their temporal affairs, when they are in the full enjoyment of their health and reason, in order to avoid thereby the difficulties which arise when we are laboring under a dangerous disease, which takes from us the use of our reasonable faculties, and consequently deprives us of the understanding and memory necessary to the faithful and peaceable settlement of our family affairs, with a view to avert from our heirs the difficulties always prejudicial to those that are absent. Now, therefore, under these circumstances, I invoke the grace and clemency of God, to whom I recommend my soul when separated from my body; and I wish and ordain, that the latter be buried among faithful Christians, with all the usual rites of our Mother Church, leaving with my testamentary executors, hereinafter named, the performance of all pious works, such as causing three masses to be said on my behalf to my holy patron, as also funeral services, masses, etc.

"1. I declare that the property I am now possessed of are the earnings of my labor and savings, and consist of the following items, to wit: Three houses and several lots situated in suburb St. Mary, above the city of New Orleans, and one in Chartres Street, now occupied by my brother, Nicolas Girod; one main plantation, whereon I reside, situated in said Bayou Lafourche, with all the buildings, improvements, and appurtenances thereof, and being thirty-one and a half arpents front, together with the utensils, implements of husbandry, animals of all kind, and one hundred and odd slaves of different ages belonging to me; also, a quantity of lands situated in the different parishes of the bayou, the titles to which I hold in my possession; also, a certain sum of money is due to me, which I can not ascertain at present, but which will be made to appear by the books and obligations in my power; also, I am the owner of upward of two hundred and seventy bales of ginned cotton, now in my stores; also, I declare that I am indebted unto divers persons by obligations, and little by accounts, in a sum of about thirty thousand dollars.

"3. I give and bequeath to my parish of Thône, in Savoy, to have a solemn mass annually said on my behalf, and to contribute to the repairs of said church, a sum of two thousand dollars, such being my will.

"4. I give to the poor of my said parish, to be distributed among them so as to meet their most pressing wants, a sum of one thousand dollars, such being my will.

"5. I give and bequeath to the cousins, Dodos Gollié, of said parish, a sum of five hundred dollars, such being my will.

"6. I give and bequeath to the brothers and sisters, Joseph Suard, Senior, and Antoine Suard, Junior, sons of Antoine Suard, deceased, since about thirty years, residing at Cluse, in Fonsigny (Savoy), the sum of two thousand dollars, such being my will.

"7. I give and bequeath to my distant relations of said parish a sum of five hundred dollars, to be distributed among them, such being my will.

"8. I give and bequeath to the Charity Hospital of Thône, in Savoy, a sum of one thousand dollars, such being my will.

"9. I give and bequeath to the children of my deceased sister, Françoise, wife of Poidebard, without prejudicing their rights in and to my succession, the sum of two thousand dollars, to be divided between them by equal portions, such being my will.

"10. I give and bequeath to my sister Teresa, wife of Quetant, without prejudice to her rights in my succession, a sum of one thousand dollars, such being my will.

"11. I give and bequeath to my god-daughter and sister, Rosalie, married at Taloire, her husband's name being unknown to me, a sum of one thousand dollars, without prejudice to her rights in my succession, such being my will.

"12. I give for once to my brother James Girod, a sum of four thousand dollars, without any other rights or pretensions whatever in and to my succession, such being my last will.

"13. I give and bequeath to my brother Claude, married, the sum of two thousand dollars, without prejudice to his rights in my succession, such being my last will.

"14. I give and bequeath to the parish of Assumption, for the church-wardens in Lafourche, where I now reside, a sum of five hundred dollars, for contributing to the construction of a church, such being my will.

"15. I give and bequeath to the mulattress Françoise Vils, for the faithful services she has rendered to me at my house, during a long space of time, a sum of six thousand dollars, which shall be paid to her (after my death) one, two, and three years, such being my will.

"16. I give and bequeath to my god-daughter Françoise, a free colored woman, the daughter of Rosette, a negro woman, a sum of fifteen hundred dollars, such being my last will.

"17. I give and bequeath to the mulattress Belanie, wife of Colas Meillen, a sum of two hundred dollars, such being my will.

"18. I give likewise to her younger sister Polline, a sum of two hundred dollars, such being my will.

"19. I give and bequeath to my mulatto slave Dominic, who is a blacksmith and rum-distiller, his freedom, which he shall be put in possession of six months after my death, for his good and faithful services to me.

"20. I nominate for my testamentary executors the following persons: my brother Nicolas, who is my senior, and Jean François, my junior, the former being a merchant in New Orleans, and the second is a planter, residing at Washita, and in their default, Mr. Phillipon, Senior, merchant at New Orleans, to whom I give, by the present olographic testament, full power and authority as required by law to take possession of all my property présent and to come, to inventory, sell, and cause them to be sold, as to him will seem best for the heirs of all my brothers and sisters, present and absent, without intervention of justice, hereby annulling and declaring void all other testaments, codicils, and donations, *mortis*

causa, and other acts of last will which I may have made previous to and to the prejudice of the present, which is the only one I adopt as being my last will, in order that my heirs may inherit and enjoy my property with the benediction of God and mine, etc.

"Done and passed on my plantation, at Lafourche, the 30th of November, 1812. (Signed,) C. F. GIROD.

"J^H COURRIE, *witness*. SAINT FELIX, *witness*. Ne varietur ———."

The appellants assign for error in the decree rendered against them in the court below :

1. That there is a total want of equity throughout the complainants' bill, and in the evidence adduced in support of it.

2. That, under the evidence and allegations of the bill, the complainants have no claim in a court of equity, by reason of their long silence, laches, and acquiescence in the acts complained of since 1814.

3. That the cause of action, as set forth by the complainants, is barred and prescribed by lapse of time under the laws of Louisiana.

4. That the disallowance of the sums of \$40,418 and of \$8,253, and the decree concerning the judgments for said amounts, is contradictory and in violation of law.

5. That the agreements made by two of the complainants with the defendant in 1817 are valid, obligatory, and conclusive upon the parties; that the declaration of the co-executor, J. F. Girod, has the same effect.

6. That the discharge of J. F. Girod, the co-executor, destroys all claim in equity against the defendants.

The cause was argued by *Mr. Eustis*, for the appellants, and *Mr. Janin*, for the appellees.

Mr. Justice WAYNE delivered the opinion of the Court.

The conclusions to which we have come in this cause do not require from us any comment upon its facts.

We concur with the learned judge in the Circuit Court, in setting aside the purchases by which Nicholas Girod and Jean François Girod became the possessors of their testator's entire estate. But the morality and policy of the law, as it is administered in courts of equity, induce us to add, that those purchases were fraudulent and void, and may be declared to be so, without any further inquiry, upon the ground that they were made by the intervention of persons who were nominal buyers of the property for the purpose of conveying it to the executors. Such a transaction carries fraud upon the face of it, *Lord Hardwicke v. Vernon*, 4 Vesey, Jr. 411; 14 Vesey, Jr. 504; 2 Bro. C. C. 410, note. It matters not, in such a case, whether the sales are

made with or without the sanction of judicial authority, or with ministerial exactness. The rule of equity is, in every code of jurisprudence with which we are acquainted, that a purchase by a trustee or agent of the particular property of which he has the sale, or in which he represents another, whether he has an interest in it or not—*per interpositam personam*—carries fraud on the face of it. In this instance, Laignel and St. Felix were the instruments of the executors. They bid off the property, paid nothing, received titles, and conveyed what they nominally bought to the executors. In this way Nicholas Girod became the purchaser of all the testator's property in New Orleans, and himself and his brother Jean François, the other executor, were joint purchasers of the lands and slaves in the parish of Assumption, and of the testator's lands elsewhere. Jean François, some years afterward, sold out his half of their joint purchase to Nicholas, for \$70,000. Thus the latter became the possessor of the entire estate, and held it until he died, to the exclusion of all the other testamentary heirs. Some of those heirs, and the representatives of others of them, now sue the representatives of Nicholas Girod, and seek to set aside the purchases of the executors. They allege that they were fraudulently made, ask that they may have assigned to them their respective portions of the estate, with an account of rents and profits, excepting from their claim for the latter the moiety which had been received by Jean François Girod. The defendants reply, and deny fraud in fact or in intention on the part of the executors. They declare, that the sales were judicially ordered and conducted, that the purchases were rightfully made, for a fair price, at public auction; that the complainants have no standing in a court of equity by reason of their long silence, laches, and acquiescence in the acts of which they complain, and that their rights are barred by lapse of time, under the laws of Louisiana. They also say, that receipts or acquittances were given to the executors by two of the complainants, which are valid and obligatory upon them. The bill and answers, and the arguments of the learned counsel for the appellants, then involve the question of the right of executors to purchase any part of the estate which they administer, for a fair price, at a public sale judicially ordered and conducted. Remarking, first, that an executor or

administrator is in equity a trustee for heirs, legatees, and creditors, we proceed to give our opinion of the law in respect to purchases of the estate represented by them, and of purchases made by other trustees and agents, and all persons *qui negotia aliena gerunt*. The rule as to persons incapable of purchasing particular property except under particular restraints, on account of the rules of equity, is compendiously given by Sir Edward Sugden, in his second section of purchases by trustees, agents, etc. It has been adopted by almost every subsequent writer, and we cite the passage with confidence, having verified its correctness by an examination of all the cases cited by him; by an examination, also, of other cases in the English courts, and of cases in the courts of chancery of several of the States in our Union, sustaining the doctrine, to the fullest extent, of the incapability of trustees and agents to purchase particular property, for the sale of which they act representatively, or in whom the title may be for another. He says: "It may be laid down as a general proposition, that trustees—unless they are nominally such to preserve contingent remainders—agents, commissioners of bankrupts, assignees of bankrupts, solicitors to the commission, auctioneers, creditors who have been consulted as to the mode of sale, or any persons who, by their connection with any other person, or by being employed or concerned in his affairs, have acquired a knowledge of his property, are incapable of purchasing such property themselves, except under the restraints which will shortly be mentioned. For if persons having a confidential character were permitted to avail themselves of any knowledge acquired in that capacity, they might be induced to conceal their information, and not to exercise it for the benefit of the persons relying upon their integrity. The characters are inconsistent. *Emptor emit quam minimo potest, venditor vendit quam maximo potest*," 2 Sugd. Vendors and Purchasers, 109, London ed., 1824 (a). The principle has been extended to a

(a) *Trustees*.—*Fox v. Mackreth*, 2 Bro. C. C. 400; 4 Bro. P. C. (Tomlins's) 258, *Hall v. Noyes*, 3 Bro. C. C. 483, and see 3 Vesey, Jr. 748; *Kellick v. Flexny*, 4 Bro. C. C. 161; *Whicheote v. Lawrence*, 3 Vesey, Jr. 740; *Campbell v. Walker*, 5 Vesey, Jr. 678, and *Whitackre v. Whitackre*, Sel. Chan. Cases, 13.

Remainders.—See *Parks v. White*, 11 Vesey, Jr. 226.

Agents.—*York Buildings Co. v. Mackenzie*; *Lowther v. Lowther*, 13 Vesey, Jr.

purchase by an attorney from his client whilst the relation subsists, *Bellew v. Russell*, Ball & Beatty, 96; 9 Vesey, Jr. 296; 13 Vesey, Jr. 133. As to gifts, *Lord Selsey v. Rhoades*, 2 Sim. & Stu. 41; *Williams v. Llewellyn*, 2 You. & Jer. 68; *Champion v. Rigby*, 1 Russ. & Myl. 539. Nor can an arbitrator buy up the unascertained claims of any of the parties to the reference, *Blannerhasset v. Day*, 2 Ball & Beatty, 116; *Cane v. Lord Allen*, 2 Dow, 289. Where a person can not purchase the estate himself, he can not buy it as agent for another, 9 Vesey, Jr. 248; *ex parte Bennett*, 10 Vesey, Jr. 381.

The general rule stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity. It restrains all agents, public and private; but the value of the prohibition is most felt, and its application is more frequent, in the private relations in which the vendor and purchaser may stand toward each other. The disability to purchase is a consequence of that relation between them which imposes on the one a duty to protect the interest of the other, from the faithful discharge of which duty his own personal interest may withdraw him. In this conflict of interest, the law wisely interposes. It acts not on the possibility, that, in some cases, the sense of that duty may prevail over the motives of self-interest, but it provides against the probability in many cases, and the danger in all cases, that the dictates of self-interest will exercise a predominant influence, and supersede that of duty. It therefore pro-

95; see *Watt v. Grove*, 2 Sch. & Lef. 492; *Whitcomb v. Minchin*, 5 Madd. 91; *Woodhouse v. Meredith*, 1 Jac. & Walk. 204.

Commissioners of Bankrupts.—*Ex parte Bennett*, 10 Vesey, Jr. 381; *ex parte Dumbell*, August 13, 1806, Mont., notes, 33 cited; *ex parte Harrison*, 1 Buck. 17.

Assignees of Bankrupts.—*Ex parte Reynolds*, 5 Vesey, Jr. 707; *ex parte Lacey*, 6 Vesey, Jr. 625; *ex parte Bage*, 4 Madd. 459; *ex parte Badcock*, 1 Mont. & Mac. 281.

Solicitors to the Commission.—*Owen v. Foulkes*, 6 Vesey, Jr. 630, note b.; *ex parte Linwood*; *ex parte Churchill*, 8 Vesey, Jr. 343 cited; *ex parte Bennett*, 10 Vesey, Jr. 381; *ex parte Dumbell*, August 13, 1806, Mont., notes, cited; see 12 Vesey, Jr. 372; 3 Mer. 200.

Auctioneers, creditors consulted as to mode of sale, or any persons who, by their connection with, or concern in, the affairs, have acquired a knowledge, etc.—See *ex parte Hughes*, 6 Vesey, Jr. 617; *Coles v. Trecothick*, 9 Vesey, Jr. 234; 1 Smith, 233; *Oliver v. Court*, 8 Price, 127.

hibits a party from purchasing on his own account that which his duty or trust requires him to sell on account of another, and from purchasing on account of another that which he sells on his own account. In effect, he is not allowed to unite the two opposite characters of buyer and seller, because his interests, when he is the seller or buyer on his own account, are directly conflicting with those of the person on whose account he buys or sells, 2 Burge's Comm. 459. Cases have been frequently decided in the courts of Louisiana, which maintain the rule in all its integrity. In Pennsylvania it is enforced, though, on looking over its reports, we find a case, but unsustained by any reference to adjudged cases, in which it is said that an executor might buy at a sale of the testator's effects, if he did so for a fair price, at public auction. In Maryland, the courts of chancery carry out the rule to the fullest extent of the principles upon which it is founded, and as they have just been stated by us. In the case of *Wormley v. Wormley*, 8 Wheat. 421, this Court declared that no rule is better settled, than that a trustee can not become the purchaser of the trust estate. He can not be, at the same time, vendor and vendee. It had been previously ruled, in the case of *Prevost v. Gratz*, 6 Wheat. 481, and this Court afterward, in *Ringo et al. v. Binns et al.*, reaffirmed the rule, by its application to an agent who had bought land to which his principal was in equity entitled. It said, "The proposition laid down by this court is, that if an agent discovers a defect in the title of his principal to land, he can not misuse it to acquire a title for himself; and if he does, that he will be held as a trustee holding for his principal," 10 Pet. 269, 281; see also the case of *Oliver v. Piatt*, 3 How. 333. It is also affirmed in *Church v. Marine Insurance Company*, 1 Mason, 341, that an agent or trustee can not, directly or indirectly, become the purchaser of the trust property which is confided to his care. We scarcely need add, that a purchase by a trustee of his *cestui que trust, sui juris*, provided it is deliberately agreed or understood between them that the relation shall be considered as dissolved, "and there is a clear contract, ascertained to be such, after a jealous and scrupulous examination of all the circumstances, and it is clear that the *cestui que trust* intended that the trustee should buy, and there is no fraud, no concealment, and no advan-

tage taken by the trustee of information acquired by him as trustee," will be sustained in a court of equity. But it is difficult to make out such a case, where the exception is taken, especially when there is any inadequacy of price, or any inequality in the bargain, *Coles v. Trecothick*, 9 Vesey, 246; *Fox v. Mackreth*, 2 Bro. C. C. 400; *Gibson v. Jeyes*, 6 Vesey, 277; *Whichcote v. Lawrence*, 3 Vesey, 740; *Campbell v. Walker*, 5 Vesey, 678; *Ayliffe v. Murray*, 2 Atk. 59. And therefore, if a trustee, though strictly honest, should buy for himself an estate from his *cestui que trust*, and then should sell it for more, according to the rules of a court of equity, from general policy, and not from any peculiar imputation of fraud, he would be held still to remain a trustee to all intents and purposes, and not be permitted to sell to or for himself, 1 Story's Com. on Eq., 2d edit., 317; *Fox v. Mackreth*, 2 Bro. C. C. 400; S. C., 2 Cox, 320, 327.

In New York there has been no relaxation of it, since the decision in the case of *Davoue v. Fanning*, 2 Johns. 252. It is a critical and able review of the doctrine, as it had been applied by the English courts of chancery from an early day, and has been received, with very few exceptions, by our State chancery courts, as altogether putting the rule upon its proper footing. Indeed, it is not too much to say, that it has secured the triumph of the rule over all qualifications and relaxations of it in the United States, to the same extent that had been achieved for it in England by that great chancellor, Lord ELDON. *Davoue v. Fanning* was the case of an executor for whose wife a purchase had been made by one Hedden, at public auction, *bona fide*, for a fair price, of a part of the estate which Fanning administered, and the prayer of the bill was, that the purchase might be set aside, and the premises resold. The case was examined with a special reference to the right of an executor to buy any part of the estate of his testator. And it was affirmed, and we think rightly, that if a trustee, or person acting for others, sells the trust estate, and becomes himself interested in the purchase, the *cestuis que trust* are entitled, as of course, to have the purchase set aside, and the property re-exposed to sale, under the direction of the court. And it makes no difference in the application of the rule, that a sale was at public auction, *bona fide*, and for a fair price, and that the executor did not

purchase for himself, but that a third person, by previous arrangement with the executor, became the purchaser, to hold in trust for the separate use and benefit of the wife of the executor, who was one of the *cestuis que trust*, and who had an interest in the land under the will of the testator. The inquiry, in such a case, is not whether there was or was not fraud in fact. The purchase is void, and will be set aside at the instance of the *cestui que trust*, and a resale ordered, on the ground of the temptation to abuse, and of the danger of imposition inaccessible to the eye of the court. We are aware that cases may be found, in the reports of some of the chancery courts in the United States, in which it has been held that an executor may purchase, if it be without fraud, any property of his testator, at open and public sale, for a fair price, and that such purchase is only voidable, and not void, as we hold it to be. But with all due respect for the learned judges who have so decided, we say that an executor or administrator is, in equity, a trustee for the next of kin, legatees, and creditors, and that we have been unable to find any one well-considered decision, with other cases, or any one case in the books, to sustain the right of an executor to become the purchaser of the property which he represents, or any portion of it, though he has done so for a fair price, without fraud, at a public sale. Why should the rule be relaxed in the case of persons most frequently exposed to the temptations of self-interest, who may yield to it more readily than any others, with a larger impunity, if the day of equitable retribution shall ever come for those who have been defrauded? Is it not better that the cause of the evil shall be prohibited, than that courts of equity shall be relied upon to apply the remedy in particular cases, by inquiring into all the circumstances of a case, whether there has or has not been fraud in fact? Is the rule to be relaxed, in the case of executors, in respect to all persons interested in the estate, or only to such of them as are *sui juris*? And if only to those who are *sui juris*, why in case of an executor as to such persons, when the rule has never been relaxed by any court of equity to permit purchases by any other trustee or agent of one who is *sui juris*? Shall it be relaxed in cases of those who are interested in the estate and who are not *sui juris* or minors? Then other remedies must be devised to protect their interests

than that which experience has shown to be alone efficacious. It is, that when a trustee for one not *sui juris* sees that it is absolutely necessary that the estate must be sold, and he is ready to give more for it than any one else, that a bill should be filed, and he should apply to the court by motion, to let him be a purchaser. This is the only way he can protect himself. There are cases in which the court will permit it, *Campbell v. Walker*, 5 Vesey, Jr. 478; 13 Vesey, Jr. 601; 1 Ball & Beatty, 418 (a).

Such is the proceeding adopted in Louisiana, when property in which a minor is interested is offered for sale, as may be seen by the case in 5 Louisiana R. 16, *M'Carty v. Steam Cotton Press Company et al.* The property was sold at auction, and the mother of the minor became the purchaser. It was contended that this purchase was null and void, because the property had descended to the children immediately after the death of the father, and the mother, who, by the effect of the law, was their natural tutor, could not buy it. The court said it was a general rule. But it having been shown that the mother and purchaser had petitioned the Court of Probates for a ratification of the sale, and that the court had ratified it upon the advice of a family meeting, the sale was confirmed. And the court held, that under the Spanish law (20) a tutor could purchase the property of his ward, with the permission of the judge.

We have said more upon the relaxation of the rule in the case of executors than we would have done, if the learned counsel for the appellants had not pressed, as an exemption from the rule, purchases made by executors without fraud, at open sale, especially when by the will they were empowered to sell the estate of their testator for the benefit of heirs and legatees, and were heirs or legatees themselves. And if it had not been urged that the decisions of the Supreme Court of Louisiana were unsafe guides in interpreting the Spanish laws in respect to the incapacity of persons to purchase at judicial sales particular property, on account of the official or financiering relation in which they stood to the persons who owned the property. It was supposed that the qualifications of the rule by the civil law embraced executors, or might do so by the reason upon which

(a) Such continues to be the rule, *Norman v. Norman*, 6 Bush's Ky. 496.

those qualifications were sustained. It imposes upon us the task of showing that the relaxations of the rule by the civil law were never permitted by the Spanish law which prevailed in Louisiana, and were never extended under the civil law, to permit the executor *testamentarius* or executor *dativus* to buy the property which he was appointed to administer. It is a subject of curious and instructive examination to trace the rule or prohibition, in the course of its application under the jurisprudence of different nations. In all of them, there were limited and occasional relaxations of the rule in particular cases, in what are sometimes called hard cases, but in no one nation have purchases by executors been permitted, as a relaxation of the civil law rule. For a general historical examination of the subject, we have not time; we wish we had. A brief examination, however, of the qualifications of the rule by the civil law will not be inappropriate upon an appeal from a court held in Louisiana, where the civil law exists in a modified form, and is still often the rule of decision by its enlightened jurists. The prohibition of the civil law is thus expressed: "*Tutor rem pupilli emere non potest; idemque porrigendum est ad similia, id est, ad curatores, procuratores, et qui negotia aliena gerunt,*" Dig., Lib. 18, tit. 1, l. 34; Inst., Lib. 1, tit. 21, 23.

The rule as expressed embraces every relation in which there may arise a conflict between the duty which the vendor or purchaser owes to the person with whom he is dealing, or on whose account he is acting, and his own individual interest. Nor was it ever relaxed or qualified by the civil law, further than to allow the guardian to purchase the property of the ward, *palam et bona fide*, at public auction. "*Cum ipse tutor nihil ex bonis pupilli, quæ distrahi possunt, comparare palam et bona fide prohibetur; multo magis uxor ejus hoc facere potest,*" Cod., Lib. 4, tit. 38, l. 5. But foreseeing the mischief which might grow out of the relaxation, it required that the purchase must be made by the guardian himself, *palam et bona fide*, and not *per interpositam personam*. "*Sed si per interpositam personam rem pupilli emerit, in ea causa ut emptio nullius momenti sit, quia non bona fide videtur rem gessisse. Et ita est rescriptum a D. Severo et Antonino,*" Dig., Lib. 26, tit. 5, l. 5, sec. 3. A purchase by a guardian from his co-guardian was permitted, if it took place in

public, and *bona fide*. "*Item ipse tutor et emptoris et venditoris officio fungi non potest. Sed enim si contutorem habeat, cujus auctoritas sufficit, procul-dubio emere potest. Sed si mala fide emptio intercesserit, nullius erit momenti, ideoque nec usucapere potest. Sane, si suæ ætatis factus comprobaverit emptionem, contractus valet,*" Dig., Lib. 26, tit. 8, l. 5, sec. 2.

The guardian might purchase at a sale made at the suit of a creditor. "*Si creditor pupilli distrahat, æque emere bona fide poterit,*" Dig., Lib. 26, l. 5, sec. 5. Such is the extent of the qualification of the rule of the civil law. And, its limitation not being well understood, persons have often been misled to apply it to what they supposed to be analogous agencies, such as executors, when there was no authority either in the text of the civil law, or in the practice under it, for doing so. But, further, those qualifications of the rule mentioned were confined in practice to those territories in Europe in which the civil law prevailed without modification. And it is remarkable, considering what were the influences upon Christendom of the civil law, after its discovery in the twelfth century—and when not until some time after it began to be used as a rule of law by which public and private rights were determined—when in the fifteenth and sixteenth centuries it was the study of the wisest men,—it is remarkable that the qualifications of the rule, as they have been stated, were considered imperfections, and were rejected by every nation in Europe whose codes are generally admitted to have been compiled from the civil law, with an intimate knowledge of human nature, as it has always shown itself in the business of life. Here, appropriate to what has been just said, is the language of Pothier: "*Nous ne pouvons acheter, ni par nous-mêmes, ni par personnes interposées, les choses que font partie des biens dont nous avons l'administration; ainsi un tuteur ne peut acheter les choses qui appartiennent à son mineur; un administrateur ne peut acheter aucune chose de bien dont il a l'administration,*" Tr. du Contrat de Vente, part 1, n. 13. The rule of the civil law, without qualification, is adopted in the codes of Holland. "*Quæ vero de tutoribus cauta, ea quoque in curatoribus, procuratoribus, testamentorum executoribus, aliisque similibus, qui aliena gerunt negotia, probanda sunt,*" Voet., Lib. 18, tit. 1, n. 9; 2 Burge's Comm. 463. In Spain, the rule was enforced

without relaxation, and with stern uniformity. Judge M'CALEB cites in his opinion, from the Novissima Recopilacion, the rule, in the following words: "No man, who is testamentary executor or guardian of minors, nor any other man or woman, can purchase the property which they administer, and whether they purchase publicly or privately the act is invalid, and on proof being made of the fact, the sale must be set aside." This was the law of Louisiana when the executors in this instance made their purchases, and it is conclusive of the invalidity.

We have thus shown, that those purchases are fraudulent and void, from having been made *per interpositam personam*, and if they were not so on that account, that they are void by the rule in equity in the courts of England, and as it prevails in the courts of equity in the United States. It has also been shown, that they are void by the law of Louisiana, as it was when they were made by the executors, and that such purchases never were countenanced in that state by any qualification of the civil law rule prohibiting purchases by those who stood in such fiduciary relations to others; that the act could not be generally done, without creating a conflict between self-interest and integrity. In every aspect in which we have viewed this case, we are called upon to direct that the purchases made by Nicholas and Jean François Girod of their testator's estate should be set aside. We shall order it to be done. Nor do we think that the complainants have lost their rights by negligence, or by the lapse of time. We can only see in their conduct the fears and forbearance of dependent relatives, far distant from the scene of the transactions of which they complain, desirous of having what was due to them, and suspecting it had been withheld, but unwilling to believe that they had been wronged by brothers, with whom they had been associated in a common interest by another brother who was dead. In a case of actual fraud, courts of equity give relief after a long lapse of time, much longer than has passed since the executors, in this instance, purchased their testator's estate. In general, length of time is no bar to a trust clearly established to have once existed; and where fraud is imputed and proved, length of time ought not to exclude relief, *Prevost v. Gratz*, 6 Wheat. 481. Generally speaking, when a party has been guilty of such laches in prose-

cuting his equitable title as would bar him if his title were solely at law, he will be barred in equity, from a wise consideration of the paramount importance of quieting men's titles, and upon the principle that *expedit reipublicæ ut sit finis litium*; although the statutes of limitations do not apply to any equitable demand, courts of equity adopt them, or at least generally take the same limitations for their guide, in cases analogous to those in which the statutes apply at law, 10 Vesey, 467; 1 Cox, 149. Still, within what time a constructive trust will be barred must depend upon the circumstances of the case, *Boone v. Chiles*, 10 Pet. 177. There is no rule in equity which excludes the consideration of circumstances, and in a case of actual fraud, we believe no case can be found in the books in which a court of equity has refused to give relief within the lifetime of either of the parties upon whom the fraud is proved, or within thirty years after it has been discovered or becomes known to the party whose rights are affected by it. In this case, that time has not elapsed since the executors made their purchases, and it is not pretended that they were known to any of the complainants until the year 1817, and not then, except by the exhibition of an account by the executors to some of the complainants, with declarations that every thing had been fairly done with a view to save the honor of the testator and the interests of those who were the objects of his bounty. In this view of the case, it is not necessary for us to consider the time within which remedies are barred, or property may be acquired by prescription under the laws of Louisiana. We would willingly otherwise do so, for the result would show the same harmony in the application of the rules of the civil law and those of Louisiana upon prescription with the rules prevailing in courts of equity in England and the United States, as we trust has been shown to exist between them in the prohibition of an executor to buy the estate of his testator.

The receipts or acquittances given by two of the complainants to the executors do not affect their rights. They were obviously given without full knowledge of all the circumstances connected with the disposal and management of the estate. Indeed, it is plain that such information had been withheld by the executors. It is true that an account was presented to them,

with official signatures to it, but without vouchers of any kind to verify its correctness, and it was accompanied by a letter from Nicholas Girod, in which menaces of displeasure are mingled with intimations of future kindness.

We shall also direct the official proceedings which were had upon the account of Nicholas Girod, against the estate of Claude, to be set aside and annulled. But there will be allowed to the representatives of Nicholas, in the settlement of the estate, the sum of \$6,574.20, with interest at five per cent. The proofs in the cause show that, a few months before the death of the testator, there had been a settlement of accounts between him and Nicholas, and we allow that amount, as it is charged in the general account, disallowing all the other items. We suppose it to be an inadvertency in drawing up the decree, that the sum just mentioned was not allowed, as the learned judge, in his opinion, states that a settlement had taken place, with that result.

We shall also direct that the actual cost of all permanent improvements which were made upon any part of the estate by Nicholas Girod shall be allowed to his representatives, with interest at five per cent in the settlement which shall be made with the complainants and the other persons having an interest under the will of Claude. And also an allowance for taxes, and the expenses and cost paid in recovering the property gained by alluvion. A reference to a master will be directed. We regret to perceive from the record, that all the persons who are interested in the estate of Claude F. Girod are not parties to this proceeding. We shall direct, that they shall be permitted to make themselves parties, if they please to become so. But in giving the order, it is not intended to delay those from receiving their portions in whose behalf this decree is made. The fruits of their vigilance can be apportioned according to their respective rights in the estate, when one of the original testamentary heirs claims; and the Circuit Court, in the further proceedings in the cause under the mandate of this Court, will of course take care to ascertain who are the representatives of others of them who are dead.

Jean François Girod is not a party in this cause, and therefore we can give no decree against him, but should he offer to become a party for the purpose of claiming what under the will

was his portion of the estate of Claude, or should it be claimed by any representative of his, we think it right to remark, for the purpose of preventing further litigation in this matter, that such claim will be subject to all the equities subsisting between Jean François and Nicholas, and especially to the allowance to the representatives of Nicholas of the purchase-money which was given by Nicholas to Jean, for the one-half of their joint purchase of the property of their testator, with interest at the rate according to their contract up to the times when the purchase-money was paid, and afterward at five per cent.

THE YORK AND NORTH MIDLAND RAILWAY COMPANY
v. HUDSON (*a*).

[*This case was decided in the English Rolls Court, Sir JOHN ROMILLY, Master of the Rolls, in 1853. Reported in 16 Beavan, 486.*]

A general meeting of a railway company placed 12,050 shares in a projected extension line at the disposal of the directors. *Held*, that the disposal was merely as trustees for the company, and not for their own benefit; and Hudson, who was the chairman (and exercised uncontrolled authority in the conduct of the concerns of the company), having sold a considerable part of such shares at a premium, was held liable to account to the company for their produce, with interest at 5 per cent. *Held*, also, that he could not retain the profits, either as a large land-owner on the line, or as a remuneration for his great services, or on the ground of the acquiescence of the shareholders, to be inferred from a presumed knowledge of the share-book.

The chairman of a railway company allotted a number of the unappropriated shares to his nominees; they were sold at a premium, and the produce received by him. *Held*, that, as trustee, he was bound to the company for the profit made.

The chairman of a railway company appropriated various unallotted shares to the use of various persons, whose names he did not mention, in order to secure or reward services which he declined to state, but which it was insinuated was in the nature of "secret service money." *Held*, that if the defendant had applied the property of the company in a manner which would not bear the light, he must suffer the consequences; and that being charged with the receipt of the money, he could not discharge himself by the suggestion of such an application.

(*a*) The intelligent reader will readily recognize in this name, the "Great English Railway King" of the "flush times" in railroad speculations in that country. He is but recently reported as having died in poverty and obscurity in Paris.

This case was argued by the Solicitor General (Mr. *Bethell*), Mr. *R. Palmer*, and Mr. *Hobhouse*, for the plaintiff. By Sir *Fitz Roy Kelly*, Mr. *Rolt*, Mr. *Toller*, and Mr. *C. H. Grove*, for the defendant.

THE MASTER OF THE ROLLS. The York and North Midland Railway Company had been incorporated by statute, in the year 1836. From the time of its original formation, the defendant had been the chairman of that company, and it is the common case both of the plaintiff and the defendant, that he possessed and exerted an unusual degree of influence in the management of the company. He gave orders on his own sole authority to the servants and officers of the company, respecting the management of it, and he even delegated persons to give orders as coming from himself. These orders seem never to have been disputed, and he exercised an uncontrolled authority in the conduct of every part of the concerns of the company; and inasmuch as the other directors seem rarely to have interfered, or when they did, to have acted only at his instance, and to give effect to his directions, he may, in some sense, be said to have constituted by himself the board of directors of the company. It is the common case also both of the plaintiff and of the defendant, that the company thrived much, in public estimation at least, under this management, and it was generally regarded, in the beginning of the year 1846, as being in a state of great prosperity.

In the year 1845, if not earlier, a project had been entertained to extend the operation of the York and North Midland Railway Company, by the formation of three new lines of railway—one of which was to extend from York to Beverly, a second from York to Leeds, and a third was to extend the Whitby and Pickering Railway to Castletown; and accordingly, in the month of January, 1846, at the regular half-yearly general meeting of the company, held on the 16th of that month, after the annual report had been read and adopted, the defendant, as chairman of the company, explained the projected extension to the assembled shareholders, and obtained their sanction and authority to apply to Parliament for powers to make these additional lines, and to raise the capital necessary for the purposes

there mentioned. The amount of capital to be raised, and the way in which it was to be apportioned, were publicly explained to the meeting by the defendant, and were embodied in a resolution passed by the meeting, which I shall have presently to comment upon. The plan was this: an additional capital of one million and a quarter was required; it was to be raised by 50,000 shares at £25 each, to be called the East and West Riding Extension Shares, and these were to be apportioned in the following manner: they were to be allotted to every person holding shares in the York and North Midland Railway, in the proportion of one extension share to every share of £50, and one extension share to every two shares of £25, held in the York and North Midland Railway Company. This, according to the number of such original shares, would exhaust 37,950 of the extension shares, and the remainder, amounting to 12,050, were to be left at the disposal of the directors. The resolution which was passed is distinct in its terms to this effect. The relief sought in this cause relates to the proceeds of a portion of these shares, so left to the disposal of the directors. The acts authorizing these extensions, and the raising of the capital necessary for this purpose, passed in the session of 1846 with much difficulty, as the defendant alleges, and as I have little doubt correctly alleges, mainly by the exertions which he had made, before and after the meeting of January, 1846, to obviate and destroy opposition. The 37,950 shares, subject to a slight deduction of thirty shares, which is not material to be noticed, were apportioned among the shareholders of the York and North Midland Railway, in the manner provided for by the resolution, and were set against their names in the Share Register Book; and in this distribution the defendant's is placed, not in the place where his name stands in the alphabetical list, and where the shares held by him beneficially were placed, but at the end of the register, after the name of the last shareholder had been entered with his appropriate number of shares. The directors, as a body, have not sanctioned any disposal of these shares, and accordingly no minute or entry is to be found in the record of the proceedings of the directors relating to them. They seem, however, to have been thus disposed of: about 1,800 were applied in a manner which, though it did not appear to

have been productive of benefit to the company, is not complained of; 4,991 still remain unappropriated; and it is with reference to the remainder, somewhat exceeding 5,000 in number, that this bill seeks relief. It appears that, in the course of the months of October, November, and December, 1846, and throughout the whole course of the year 1847, the defendant caused a considerable number of these shares to be issued and transferred into the names of various persons, who were his nominees, and that he caused them to be sold by brokers on the Stock Exchange, at premiums of various amounts, varying from £10 to £18 per share. I do not consider it necessary, for the purpose of explaining either the grounds of my decision or the nature of the decree I am about to pronounce, to go into the details of these various transactions, which are proved with great minuteness by various witnesses. I think it sufficient to state that it appears to me to be established by evidence, that upward of 5,000 shares were so disposed of, and that in the great majority of these cases it is proved that the money arising from the sale was either paid to the account of the defendant at his bankers, or by his order and according to his direction. The plaintiffs admit that they have received payment of all the money due on these shares, in respect of the deposit and calls; but they contend that this is not the limit of their rights, and that they are entitled to call upon the defendant to pay, to the company, the profit derived by him on the sale of these shares at a premium. If the matter rested on these facts alone, consistently with the rules of equity, daily administered by this Court, there could be no question as to the course to be adopted and the decree to be made. If these shares were the property of the defendant, he was entitled to make what profit he could of them for his own private advantage. If, on the other hand, they were the property of the company, he was bound to account to the company for every shilling of the profit derived from the sale of them. To determine in what character he held these shares, it is necessary to recur once more to what took place at the meeting in January, 1846. The resolution says that the 12,050 shares were to be "at the disposal of the directors;" the defendant contends that the meaning of these words, unassisted by the observations he made previous to the adoption of the

resolution, is plain, and that they mean that the directors might do what they pleased with these shares, and that the meeting intended to give them to the directors, for their own use and advantage; but that whether this were so or not, that, at least, it was intended that no account should ever be required as to the mode in which the directors did dispose of them; and further, he contends that it was well known, and is the common case of the plaintiffs and defendant, that he, as chairman, did in fact constitute the whole practical board of direction of the company, so that an intention to put these shares at the disposal of the directors was, in truth, an intention to put them at the disposal of himself, the chairman; that this was so understood by every one present at the meeting; and that, if it were not manifest on the face of the resolution, it was made so by the observations which he addressed to the meeting previous to its adoption. If this be once established, then he contends that all difficulty ceases, for that this course was sanctioned by the fourth section of the Statute of 9 Vict. c. 66, which was afterward passed in that year, and which enacted that these shares were to be distributed in such manner as a general meeting of the company should have directed, or might thereafter direct. Upon the construction of the resolution, unassisted by the observations of the chairman, I have not come to the conclusion so suggested: the directors are persons selected to manage the affairs of the company, for the benefit of the shareholders; it is an office of trust, which, if they undertake, it is their duty to perform fully and entirely. A resolution by shareholders, therefore, that shares or any other species of property shall be at the disposal of directors, is a resolution that it shall be at the disposal of trustees; in other words, that the persons intrusted with that property shall dispose of it, within the scope of the functions delegated to them, in the manner best suited to benefit their *cestuis que trust*. To construe these words as importing a gift to the directors for their individual advantage, or as investing them with a secret and irresponsible trust, would, in my opinion, be impossible, unless they were coupled with clear and unambiguous expressions to that effect. In the absence of any such expressions, not only the obligation of discharging the duty lies on the persons accepting the trust, but also the further obligation

of accounting for their discharge of it to their *cestuis que trust*, whenever required. I turn, therefore, to the observations made by the defendant at this meeting, for the purpose of ascertaining whether they contained such an intimation of the purposes for which these shares were left at the disposal of the directors as the defendant contends for; and in doing so, I assume in the defendant's favor (without in any way deciding it), that the meaning of the resolution can be varied by such observations. Having attentively read these observations, I find nothing in them to shake, but, on the contrary, much to confirm, the construction which the language of the resolution bears when taken alone. The expressions relied upon are these. [His honor read the first and second resolutions.]

If, in consequence of these observations, the directors, or even the defendant, had distributed the shares in question, or any portion of them, to the land-owners of the district referred to, or to such other persons as were interested in that district, and who, but for such distribution, would have offered serious opposition to the passing of the bill, and it were now sought to make the directors liable for the premiums which they might have obtained by the sale of these shares, if they had sold them instead of so distributing them, I could understand the force of the argument used and dilated upon, and of the complaint made by the counsel for the defendant, that the claim of the plaintiffs was inconsistent with good faith. But of the 5,000 shares, the profits arising from the disposal of which constitute the matter for which the plaintiffs require the defendant to account, not one is shown to have been given to any land-owner or to any other person interested in the district referred to, with the exception of the defendant himself. To contend, in the face of these expressions, that the assembled shareholders must have understood and meant, by their resolution, to convey, that these shares were to be at the disposal either of the directors, or of the defendant (assuming the words synonymous), and that he might, if he pleased, put in his own pocket the whole of the profit to be derived from them, appears to me incomprehensible. It is admitted that, at that time, it was well known that the scrip when issued would bear a high premium, probably upwards of £10 per share. If the shareholders meant what is contended for on

behalf of the defendant, they must have meant to enable the defendant to put into his own pocket upwards of £100,000, of which sum they might have had the benefit, either collectively or individually; and they must also have intended, when they did this, to have desired to relinquish all claim to the grace and liberality of making a gift to their chairman or of conferring a favor upon him, and must, therefore, have resolved to accomplish it in a secret and covert manner, without, so far as I can perceive, any assignable motive for so doing. I have looked in vain for a single expression to show that the defendant sought to derive, or that he intended the meeting to believe that he individually was to derive, the slightest advantage from these shares being placed at his disposal. It is true that he was a large land-owner on the line, but one of the claims urged by him to the gratitude of the company, to which I shall presently have to advert, is, that he purchased this estate with a view of disarming the opposition which might have been expected had it remained in the possession of the former owner. But, in the first place, there is no evidence to induce me to suppose that the Duke of Devonshire, the former owner, would have opposed this bill in Parliament; and secondly, if there were, it is plain, that the opposition of the owner was not disarmed, but made more dangerous, if the chairman of the company was to fill the double character of trustee for the shareholders on the one hand, and of land-owner, whose opposition was to be bought off, on the other. In my opinion, the expressions to which I have referred, vague and indefinite as they are, at the best, have no meaning when addressed to a body of the shareholders, unless they are understood to infer, that the distribution of shares was to benefit the company, by the conciliation of land-owners and of persons interested in the district through which the railway was to pass, not for the purpose of making a gratuity to them, at the mere expense of the company, but for the purpose of benefiting the company, by applying the shares in order to remove impediments that might arise by the opposition of persons of that description, and who were not, from their position, bound, as the defendant was, to do all in their power to assist the plan of the company. It does not, in my opinion, in the slightest degree, shake or alter the conclusion to which I have

come on this part of the subject, that, in 1843, a large number of shares were, in another line of railway from York to Scarborough (forming, as I was informed, a separate company, though connected with this), put expressly at the disposal of the defendant, who was the chairman. In that case, two of the shareholders objected that this was, in truth, putting a large sum of money belonging to the company, amounting to many thousand pounds, into the pocket of Mr. Hudson. The meeting discussed that question, and thought that Mr. Hudson's services had been such that he deserved that gratuity, and accordingly decided that the present should be made to him, which was accordingly done. Had any thing of a similar description occurred at the meeting in January, 1846; if one of the shareholders had then addressed the meeting, and said that "the directors" means "Mr. Hudson," that putting 12,050 shares at the disposal of the directors is putting them at the disposal of Mr. Hudson; that the shares will certainly be, on the issue of the scrip, at a premium of not less than £10 per share, and that this is, in fact, a resolution putting £120,500 in the pocket of Mr. Hudson; if any shareholder had made such observations as these to the meeting, and if that purpose had been avowed by Mr. Hudson to the meeting in January, 1846, as it had been at the meeting of the shareholders of the Scarborough branch in 1843; and if, after all this, the meeting had determined to make that present or gratuity to Mr. Hudson, in consideration of his services to the company,—then would have arisen, in this case, the ulterior question, which seems never to have been mooted, in 1843, and which, in my opinion, it is not necessary here to decide, viz., the question whether a public meeting of shareholders has the power, within the scope of the Act of Parliament and the partnership thereby created and incorporated, to bind absent persons, or even a minority, in thus disposing of the funds of the company. That question does not, in my opinion, arise in the present case; but I am anxious that nothing should fall from me to lead to the conclusion that this Court, consistently with the principles which it administers, could sanction such a proceeding. The duties and powers of the directors and shareholders are defined, with reasonable accuracy, in the statutes applicable to this subject; and the proper and becoming mode of proceeding in the case

of services as great as can be conceived, and as are here said to have been performed by Mr. Hudson, is that the individual shareholders should, from their private funds or shares, contribute such sums of money, or give such shares, as each may think fit toward creating a gratuity to reward such persons.

But then it is contended, on the part of Mr. Hudson, that the premiums on these shares formed no part of the property of the company; that the capital was fixed by the statute, and could not be increased; that the capital was one million and a quarter, and no more; and that if these shares were allotted, and the deposit and calls paid upon them, it was no concern of the company by whom they were paid, and that the capital of the company would remain the same. I have not come to that conclusion. I think it immaterial to consider, whether the profits derived from the disposal of the 12,050 shares ought to be treated as capital or income. The statute expressly states, that the shares shall be distributed in such a manner as a general meeting shall have directed or shall direct; and if the general meeting had converted this profit into capital, or if they had divided it among themselves, as part of the profits, they had, under the act, the power to do so. The act therefore has sanctioned the resolution; and, in my opinion, the fair construction of the resolution was this: the shares are left to be disposed of by the directors, according to their judgment and discretion, as they may consider best for the interest of the company; that is, for the interest of the shareholders of the company. The directors were not, I think, intended to be made liable, in case, through an error of judgment, they had disposed of some of the shares in a manner which ultimately turned out not beneficial to the company, although it seemed to be so when they parted with them. They were not, I think, intended to be made liable, in case they had, through an error of judgment, omitted to realize advantages from them which might have been obtained; but they were, in my opinion, bound to be ready, at all times, to explain their conduct in this matter to the shareholders, and, above all, on no principle could they derive to themselves directly or indirectly any personal or pecuniary advantage from the mode in which they might dispose of these shares. This is, in my opinion, the fair construction of the

resolution, and it is the only one which is consistent with equity and the principles on which this Court acts in matters of trust. Such also appears to have been the construction which the plaintiffs have put on it, for no complaint is made in respect of shares to the number of 1,800, forming part of the 12,050 shares, which seem to have been disposed of in a manner which, whether beneficial or not to the company, has not produced, and was not intended to produce, any personal or pecuniary advantage to the defendant, or to any of the directors.

The defense I have hitherto been considering affects the whole relief sought by the plaintiffs, and their title to require an account of any thing; but if the defendant fails, as in my opinion he does, in establishing it, he then sets up a separate defense, applicable, in detail, to different portions of the shares disposed of by him. In the first place, he says, that though the argument urged on his behalf, which I have hitherto been considering, would apply in terms to the whole number of 5,000 shares disposed of by him, he does not seek to retain the profit on all these shares for his own advantage. The way in which the case is put by him, or by his counsel, is this: the number of shares, the misapplication of which is complained of by the bill, is 5,105; 2,300 of these the defendant says he sold for the benefit of the company; and though, as he contends, he might claim for himself the benefit derived from them, that he does not seek to do so, but says that he is, and always has been, content that the company should have the profit derived from them; and as evidence of this, he refers to the fact that on the 16th of July, 1848, he paid £16,000 to the credit of the company, which is, what he calculates to have been, the profit derived from the sale of these 2,300 shares. The remaining number of shares he thus disposes of: 1,105 shares were, he says, applied to the use of various persons whose names he does not mention, in order to secure or reward services which he refuses to state. The remainder, consisting of 1,700 shares, he admits he applied for his own use; and he justifies and insists on his right so to do, as being only a just and barely an adequate reward for the services rendered by him to the company. With respect to the 2,300, it is plain, even if the observations I have already made did not apply, that he has submitted to an account,

and that he must account accordingly, and that in taking such account, he must be allowed the £16,000 he has paid, in that respect, together with all just allowances. With respect to the 1,105, it is insinuated in the pleadings, and openly asserted at the bar, that some secret-service money of this description is essential, for the purpose of enabling the promoters of a bill to pass it through Parliament, and that the services performed, and the persons rewarded for the performance of them, must, necessarily and as an indisputable condition, be kept concealed; and this was pushed so far as to say, that various persons who would be too high-minded to take a bribe, in the shape of money, for assistance to be rendered in Parliament, would not scruple to accept, at par, shares, capable of being sold in the market at a premium, as a remuneration for the same services. Whether this be true or not, I am unable to state. I can only state, that having had some experience in Parliament, I do not believe that an attempt to resort to any such means is necessary or useful, for the purpose of furthering the progress of a bill in Parliament. I am sure that, if practicable, it is a highly improper application of money or shares, and that this Court will not attend to the suggestion of such a mode of application as an excuse for not rendering an account.

If the defendant has applied the property of the company in a manner which will not bear the light, and for purposes which can not, with propriety, be stated even to the shareholders of the company, and which purposes have not been distinctly sanctioned by them, the defendant must bear the consequences; and if he be charged with the receipt of the money, he can not discharge himself by suggestions of any such application of any portion of it.

With regard to the remaining number of 1,700 shares, the defendant avows that he has applied them to his own use; and it is contended by him, and by his counsel on his behalf, that, regard being had to the services he had performed, and the scanty nature of the salary he received as chairman, the remuneration to which he thus helped himself was but a meager and inadequate return for the advantages he had conferred upon the company. If this plea were admissible at all, it would be incumbent on me to go through, in detail, the services rendered by the

defendant, and having done this, then to inquire what benefits, in the shape of remuneration, the defendant had received for these services, which would necessarily include any cases, if any existed, of voluntary remuneration by the shareholders, in their individual character, such as that which occurred in the Scarborough branch, to which the defendant has pointedly called my attention. But, in truth, the plea is wholly inadmissible. When Mr. Hudson accepted the office of chairman, he knew that the salary was not more than £1 per week, and yet he was content to give his services on that footing. He might possibly have considered, that the station and influence acquired in the position of chairman of the York and North Midland Railway was a remuneration for the time and labor bestowed by him, even if his services were not paid by any salary at all; but whether this were so or not, it is the duty of every man who accepts any situation to perform the duties of it thoroughly and entirely. If they require his whole time and attention, it is his duty to give that whole time and attention to the due discharge of them. This Court can never countenance a person who is placed in a fiduciary situation in retaining, for his own benefit, sums of money which have come to his hands, or have been acquired by him in that character, although the acquisition of those sums is due to his own exertions, on the suggestion that his services were worth more than what was paid for them, and that he was himself entitled to ascertain and determine the just measure of their value. If this principle were allowed, I know not what there would be to prevent any clerk from retaining the property of his master, on the plea that his master had not adequately rewarded his great and meritorious services.

If all these defenses fail, then another head of defense is brought forward, which is, that of acquiescence by the plaintiffs. It is contended, that they knew and did not complain of the appropriation of shares for many years, and that, consequently, they must be taken to have assented to it. The facts which are said to amount to acquiescence are those to which I have already shortly adverted, and which are as follows: the Share Register Books were produced to the general half-yearly meetings in January and July, 1847, and in January and July, 1848. In all of them, the list of the shareholders is continued down to

and including the letter Z. After this there appears, in the book which was produced at the general meeting in January, 1847, an entry of 9,610 shares, in the name of Mr. Hudson. At the close of the list, in the book produced in July, 1847, a similar entry appears in the same place, but the number of shares is reduced to 8,591; in January, 1848, a similar entry of 5,141 shares; and in July, 1848, a similar entry of 4,991 shares, which is the remainder of the 12,050 shares, which, as I have already stated, remained unappropriated at the time when Mr. Hudson ceased to be a director of the company. These entries were open to the inspection of all the shareholders present at those meetings. They must therefore, it is said, be considered to have read them, and thereby to have become cognizant of the fact that the shares were allotted to Mr. Hudson; and as they have taken no step in consequence, they must be considered to have acquiesced in this appropriation, and therefore they can not now disturb or complain of it. I abstain from considering whether any acquiescence to bind a company could be inferred, in the absence of any positive act of that character, from the circumstance that any individual shareholder might have seen such an entry, on four successive half-yearly occasions, the first of which is less than three years before the bill was filed; because I think it obvious that these entries have not the effect contended for. The place and manner of the entry show, clearly, that these were the unappropriated shares which were to be at the disposal of the directors; if they had been appropriated to Mr. Hudson, they would have appeared attached to his name, in the list, in its regular and alphabetical place; and so far was it from being considered that this was an appropriation of these shares to Mr. Hudson, it is the common case both of the plaintiffs and of the defendant, that the last entry of 4,991 describes the shares remaining at the disposal of the directors, and which had never been appropriated by them, either to Mr. Hudson or to any other person. If the first entry be good, to show that 9,610 shares had been appropriated to Mr. Hudson, then the last entry is equally good, to show that the 4,991 shares were appropriated to Mr. Hudson, in which case he would have been liable to pay the deposit and the calls, which would, in that event, have accrued due on such shares, and all

which would be now due from him; but no such deposit or call has ever been paid or demanded, nor has any dividend ever been declared on these shares; they are, in truth, plainly the balance of the 12,050 shares unappropriated by the company, and which were entered in the name of the chairman of the company, at the conclusion of the share-list, in order so to designate them. Whether this was the correct form of entry, or whether the more proper form would not have been, to have entered the shares to the directors of the company, it is not, in my opinion, for the purposes of this suit, material to inquire. I am of opinion, therefore, that so far as regards the East and West Riding Extension shares the defenses set up by the defendant fail, and that he must account to the plaintiffs for the profits derived by him from his disposal of these shares (a).

I have now to consider the case of the Hull and Selby Railway Shares on this subject. The facts appear to be these: In July, 1846, an act was passed, which authorized the York and North Midland Railway Company to purchase the Hull and Selby Railway, and also to raise the additional capital necessary for this purpose, not exceeding £2,000,000, by the creation of new shares, according to the directions of any past or future general

(a) See note preceding, page 38. Also note to *Baker v. Whiting*, hereinafter.

Acquiescence for years, by stockholders, in appropriating funds to carry out schemes beyond the powers of the corporation, will not legalize the act. *Coleman v. Eastern Counties R. R. Co.*, 4 Eng. Railway Cases, 518.

Prideux v. Lonsdale, 11 Weekly Reporter (1862-3), 531, before Vice-Chancellor STEWART (1863), 532: "Acquiescence, without full and sufficient knowledge of the real nature and effect of the instrument, can be of no avail." Appealed and confirmed by the Lords Justices, *Ib.* 705 (May, 1863), except as to allowing a party defendant his costs: "Delay in instituting proceedings, where the parties are members of the same family, not so strictly regarded as where they are strangers to each other."

Gatty v. Phillipson, 7 Hare, 516, 27 Eng. Ch.: "A cestui que trust discovering a breach of trust, but not receiving any benefit from it, or conniving in it for any purpose, and not recognizing the transaction, is not precluded from complaining of it merely on the ground that he abstained from making that complaint until long after he first knew it." This knowledge existed for over six years. In England the old rule of actions on the case still prevails, and are barred in six years by 21 Jac. 1, ch. 16, sec. 3; 3 Fisher's Harrison's Dig. 5478.

Binding acquiescence is in the nature of an estoppel *in pais*. *Pearce v. Mad. and Ind. R. R. Co.*, 21 Howard, 441; *Zabrieskie v. Cleveland, Col. and Cin. R. R. Co.*, 23 Howard, 381; *Sparks v. Shropshire*, 4 Bush's Ky. 552.

meeting, specially convened for this purpose. In October, 1846, the York and North Midland Railway Company, at a meeting specially convened for this purpose, came to a resolution to purchase the Hull and Selby Railway, and to raise the capital necessary, by the creation of 62,950 shares, which were to be issued in the following manner: each shareholder of the York and North Midland Railway Company was entitled, if he pleased, to take one of these shares for every share of £50, or any two shares of £25 each, held by him in the York and North Midland Railway Company. The number of shares in the Hull and Selby Railway required for this purpose, if every shareholder took the full number of shares he was entitled to, was 58,014, leaving a balance of 4,936 unappropriated in the hands of the company. I have not ascertained the exact accuracy of these numbers, nor is it material for the purposes of my present decision. The bill complains, that many of these shares were sold by the defendant, for his own purposes; and according to the evidence it appears, that 1,912½ shares were, from time to time, allotted to various persons who were mere nominees of the defendant, and were sold by brokers in the market for various sums, but always at a premium, and that the produce has been paid to the account of the defendant at his banker's, or applied according to his direction. The question is, whether the defendant is bound to account to the company for the profit thus realized by him. After the observations I have made respecting the East and West Riding Extension Shares, very little need be said to explain my decision with reference to the Hull and Selby.

The question is governed by the principles I have already stated to be applicable to the transaction relative to the disposal of the East and West Riding Extension Shares. In truth, if what took place at the meeting in January, 1846, and the resolution then passed by the meeting, could be considered as any justification for the course adopted by the defendant with reference to the East and West Riding Extension Shares, that justification is wanting, so far as regards the Hull and Selby Shares. There was no resolution of any general meeting respecting these unappropriated shares. There was no observation made at any general meeting by the chairman, or by any of the directors, concerning them. They were simply unappropriated shares in

the hands of the company, which the defendant caused to be appropriated to whomsoever he pleased, when he pleased, and sold for his own advantage as he pleased. In fact, the defense of the conduct of the defendant, relative to the Hull and Selby Shares, has been but slightly insisted on by the defendant's counsel. All that has been urged, on that head, is reducible to this argument, viz., the defendant was, for the reasons already urged, entitled to be considered as the allottee of the extension shares, the disposal of which is complained of by the plaintiffs, and being so entitled, then these shares in the Hull and Selby Railway are no more than the number properly allotted to him in respect of these East and West Riding Extension Shares, which formed part of the general stock and capital of the York and North Midland Railway Company. Assuming this argument to be correct, the determination of this question must depend on the decision to which the Court may have come with regard to the former shares. Even if I were to accede to that view of the case, it is obvious that, if my former decision be correct, the defendant can in no respect be considered as the allottee of the extension shares disposed of by him, but that he must, with reference to them, be considered in the light of the servant of the company, who has taken advantage of his situation to dispose, for his own benefit, of property of the company intrusted to him for different purposes, and for which he must be made to account. And it follows, of necessity, from the same principles and upon the same grounds, which I have already expressed with reference to them, that he must be compelled to account for the profits derived by him from the sale of the Hull and Selby shares remaining unappropriated in the hands of the company.

The result therefore is, that, in my opinion, the plaintiffs are entitled to relief, in this suit, on both branches of complaint, and that a decree must be made to this effect: Declare that the defendant is a trustee for the York and North Midland Railway Company, of the shares in the East and West Riding Extension Railways, and in the Hull and Selby Railway, disposed of by him, or by his order, in his character of chairman or director of the said company.

Declare that the defendant is bound to account to the plaintiffs for all profits derived from the sale and disposal of such shares respectively.

Take an account of all the moneys produced by or arising from the sales of all the East and West Riding Extension Shares, and Hull and Selby Railway Shares, respectively, disposed of by the defendant, or by his order, or for his use; and in taking such account, the defendant is to be charged with interest, at 5 per cent, on the sums so received by or paid to him, or to his order, or for his use, from the time when the same and every part thereof were and was received and paid respectively. And in taking such account, the defendant is to have credit for all sums paid by him to or for the use of the company, in respect of such shares respectively. And he is also to have all just allowances.

Subject to any observations from counsel as to the mode of carrying the views I have expressed into effect, I am of opinion that this is the best form of the decree. I must give interest at 5 per cent against the defendant, because, if my decision be correct, he is a trustee who has been deriving profit from the property of his *cestuis que trust*. The form also in which I have directed the account, will render it unnecessary to give any special directions as to the interest on calls, due in respect of these shares disposed of by the defendant, but which calls were left unpaid for some period of time after they had become due. I am also of opinion, that I can not charge the defendant with the value in the market of any shares, at the time of the issue, which shall not appear to have been actually sold. If, on taking the account, it should appear that shares have been actually sold for the defendant, but the exact time when, and the price for which, they were sold, can not be ascertained, in such case it will be proper to fix the defendant with the average price which the shares bore during the period within which the sale is ascertained to have taken place.

As the expense of this suit, up to this point, has been principally occasioned by the defendant resisting his liability to account, he must pay the costs of the suit, up to and including the hearing, but the costs of the rest of the suit will depend upon the result of the account.

ABERDEEN RAILWAY COMPANY v. BLAIKIE BROTHERS.

[*This was a Scotch case, decided by the House of Lords in 1854, the Lord Chancellor CRANWORTH delivering the opinion, and Lord BROUGHAM concurring. Reported in 1 M'Queen, 461.*]

- The director of a railroad company is a trustee; and, as such, is precluded from dealing, on behalf of the company, with himself, or with a firm of which he is a partner.
- It is a rule of universal application, that no trustee shall be allowed to enter into engagements in which he has, or can have, a personal interest, conflicting, or which may possibly conflict, with the interest of those whom he is bound by fiduciary duty to protect.
- So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of the question; for it is enough that the parties interested object.
- It may be that the terms on which a trustee has attempted to deal with the trust estate are as good as could have been obtained from any other quarter. They may even be better. But so inflexible is the rule, that no inquiry into that matter is permitted.
- It makes no difference whether the contract relates to real estate, or personality, or mercantile transactions; the disability arising, not from the subject-matter of the contract, but from the fiduciary character of the contracting party.
- The law of Scotland and the law of England are the same upon these points; both coming from the Roman Law, itself bottomed in the plainest maxims of good sense and equity.
- The rules which govern fiduciary relations are equitable rules, unknown to the English courts of common law. Consequently, in a case properly determinable by those equitable rules, the decision of a court of common law, when opposed to them, must be disregarded.
- The great case of the *York Buildings Company v. Mackenzie*, decided by the House, in 1795, under the advice of Lord THURLOW and Lord LOUGHBOROUGH, commented on and expounded.

THE action was by the Messrs. Blaikie, iron-founders in Aberdeen, against the railway company, for performance of a contract whereby the company had agreed to purchase and accept from Messrs. Blaikie certain iron chairs, which they were to manufacture for the company, at the rate of £8 per 100, per ton. The summons concluded for *implement* of the contract, or for damages.

The principal defense was, that Thomas Blaikie, the managing partner of the partners, was at the time of the contract a

director, and indeed chairman, of the railway company, and so incapacitated from dealing in that character with his own firm.

The Court of Session held that the Companies' Clauses Consolidation Act did not nullify the contract, although under it the contractor ceased to be a director. They, therefore, decided in favor of the *pursuers*. Hence this appeal.

The *Solicitor General* and Mr. Gordon appeared for the appellant or plaintiff. Messrs. Rolt and Macfarlane, for the respondents.

THE LORD CHANCELLOR CRANWORTH'S OPINION.

[It appears that, of the chairs, 2,710 tons were delivered, and 1,440 tons remained to be supplied, under the contract, but which the company refused to accept. The prayer was that the company should be required to accept the balance, and pay therefor the stipulated price of £8 per 100, per ton.]

This, therefore, brings us to the general question, whether a director of a railway company is or is not precluded from dealing on behalf of the company with himself, or with a firm in which he is a partner.

A corporate body can act only by agents, and it is the duty of those agents so to act as best to promote the interest of the company whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature toward their principal. And it is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which may possibly conflict, with the interest of those whom he is bound to protect. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into.

It obviously is, or may be, impossible to demonstrate how far, in any particular case, the terms of such a contract have been the best for the interest of the *cestui que trust* which it was possible to obtain. It may sometimes happen that the terms on which a trustee has dealt, or attempted to deal, with the estate or interests of those for whom he is a trustee, have been as good as could have been obtained from any other person; they may

even at the time have been better. But still so inflexible is the rule that no inquiry on that subject is permitted. The English authorities on this head are numerous and uniform.

The principle was acted on by Lord KING in *Kuch v. Sanford*, Select Cases, Temp. King, 61, and by Lord HARDWICKE in *Whelpdale v. Cookson*, 1 Ves. Sen. 8, and the whole subject was considered by Lord ELDON on a great variety of occasions. It is sufficient to refer to what fell from that very learned and able judge in *ex parte James*.

It is true that the questions have generally arisen on agreements for purchases or leases of land, and not, as here, on a contract of mercantile character. But this can make no difference in principle. The inability to contract depends not on the subject-matter of the agreement, but on the fiduciary character of the contracting party; and I can not entertain a doubt of its being applicable to the case of a party who is acting as manager of a mercantile or trading business, for the benefit of others, no less than to that of an agent or trustee employed in selling or letting land. Was, then, Mr. Blaikie so acting in the case now before us? If he was, did he while so acting contract on behalf of those for whom he was acting with himself? Both these questions must obviously be answered in the affirmative. Mr. Blaikie was not only a director, but (if that was necessary) the chairman of the directors. In that character it was his bounden duty to make the best bargains he could for the benefit of the company. While he filled that character—namely, on the 6th of February, 1846—he entered into a contract on behalf of the company with his own firm, for the purchase of a large quantity of iron chairs at a certain stipulated price. His duty to the company imposed on him the obligation of obtaining these chairs at the lowest possible price. His personal interest would lead him in an entirely opposite direction, would induce him to fix the price as high as possible. This is the very evil against which the rule in question is directed, and I here see nothing whatever to prevent its application.

I observe that Lord FULLERTON seemed to doubt whether the rule would apply where the party whose act or contract is called in question is only one of a body of directors, not a sole trustee or manager. But with all deference, this appears to me

to make no difference. It was Mr. Blaikie's duty to give to his co-directors, and through them to the company, the full benefit of all the knowledge and skill which he could bring to bear on the subject. He was bound to assist them in getting the articles contracted for at the cheapest possible rate. So far as related to the advice he should give them, he put his interest in conflict with his duty, and whether he was the sole director, or only one of many, can make no difference in principle.

The same observation applies to the fact that he was not the sole person contracting with the company; he was one of the firm of Blaikie Brothers, with whom the contract was made, and so interested in driving as hard a bargain with the company as he could induce them to make.

It can not be contended that the rule to which I have referred is one confined to the English law, and that it does not apply to Scotland.

It so happens that one of the leading authorities on the subject is a decision of this House on an appeal from Scotland. I refer to the case of the *York Buildings Company v. Mackenzie*, decided by your Lordships in 1795. When the respondent, Mackenzie, while he filled the office of "common agent" in the sale of the estates of the appellants, who had become insolvent, purchased a portion of them at a judicial auction, and though he had remained in possession for above eleven years after the purchase, and had entirely freed himself from all imputation of fraud, yet this House held that, filling as he did an office which made it his duty, both to the insolvents and their creditors, to obtain the highest price, he could not put himself in the position of purchaser, and so make it his interest that the price paid should be as low as possible.

This was a very strong case, because there had been acquiescence for above eleven years; the charges of fraud were not supported, and the purchase was made at a sale by auction. Lord ELDON and Sir WILLIAM GRANT were counsel for the respondent, and no doubt every thing was urged which their learning and experience could suggest in favor of the respondent.

But this House considered the general principle one of such importance, and of such universal application, that they reversed the decree of the Court of Session, and set aside the sale.

The principle, it may be added, is found in, if not adopted from, the civil law. In the Digest is the following passage: "*Tutor rem pupilli emere non potest; idemque porrigendum est ad similia; id est ad curatores, procuratores, et qui negotia aliena gerunt.*" Dig. Lib. xviii, t. 1, c. 34, 37.

In truth, the doctrine rests on such obvious principles of good sense that it is difficult to suppose there can be any system of law in which it would not be found.

It was argued that here the contract ultimately acted on was not entered into while Mr. Blaikie was director; for that, though a contract had been entered into in February, yet that contract was afterward abandoned, and new terms agreed on in the following month of June. This, however, is not a true representation of the facts. The contract of February was, it is true, afterward modified by arrangement between the parties; but this can not vary the case. If, indeed, the contracting parties had in June unconditionally put an end to the original contract, so as to release each other from all obligation, the one to purchase, and the other to sell, at a stipulated price, the case would have assumed a different aspect. But this was not done. The contract of June was not a contract entered into between the parties on the footing of there being no obligation then binding on them; but an agreement to substitute one contract for another, supposed to be binding. Messrs. Blaikie did not say to the directors, in June: We have no binding contract with you, but we are now willing to contract. What they said amounted in fact to this: We have a contract which was entered into in February; but we are ready, if you desire, to modify it. To hold that this, in any manner, cured the invalidity of the original contract, would be to open a wide door for enabling all persons to make the rule in question of no force.

It was further contended that whatever may be the general principle applicable to questions of this nature, the Legislature has, in cases of corporate bodies like this company, modified the rule.

The statute, *i. e.*, the Companies' Clauses Act, it was argued, has impliedly, if not expressly, recognized the validity of the contract, by enacting that its effect shall be to remove the director from his office; indicating thereby that a binding

obligation would have been created, which would render the longer tenure of the office of director inexpedient; and your Lordships were referred to the case of *Foster v. The Oxford, Worcester, and Wolverhampton Railway Company*. That was an action for breach of a contract under seal, whereby the defendants covenanted with the plaintiffs (as in the case now before your Lordships) to purchase from them a quantity of iron. The defendants pleaded that, at the time of the contract, one of the plaintiffs was a director of their company, and to this plea there was a general demurrer.

That such a contract would in this country be good at common law, is certain. The rule which we have been discussing is a mere equitable rule, and therefore all the Court of Common Pleas had to consider was how far the contract was affected by the statute. The decision was, that the statute left the contract untouched, and that its operation was only to remove the director from his office. The 85th and 86th sections of the English statute, 8 and 9 Vict. c. 16, on which the Court proceeded, are in the same words as the 88th and 89th sections of the Scotch statute, and the counsel at your Lordships' bar relied on this decision as being strictly applicable to the case now under appeal. But there is a clear distinction between them. In Scotland there is no technical division of law and equity. The whole question, equitable as well as legal, was before the Court of Session. All that the Court of Common Pleas decided was, that a contract clearly good at law was not made void by an enactment that its effect should be to deprive one of the contracting parties of an office. This decision will not help the respondents, unless they can go further, and show that the statute has had the effect of making valid a contract which is bad on general principles,—that is to say, principles enforceable here only in equity, but not recognized in our courts of common law. I can discover no ground whatever for attributing to the statute any such effect.

Its provisions, however, will still be applicable to the case of directors who become interested in contracts, as representatives or otherwise, and not by virtue of contracts made by themselves.

I have, therefore, satisfied myself that the Court of Session

came to a wrong conclusion. I therefore move your Lordships that this *Interlocutar* be reversed.

THE LORD BROUGHAM. My Lords, the opinion, or rather the doubt—at the very utmost the inclination of opinion—upon the third plea, indicated by my Lord FULLERTON, I quite agree with my noble and learned friend in thinking, ought not to weigh in this case; and therefore we have only to dispose of the general question. I also arrive at exactly the same conclusion with my noble and learned friend, that the law of Scotland differs in no respect from the law of England upon this matter; as to which it is very important to have it understood that there is really no difference between the two systems of jurisprudence.

The case of *Whelpdale v. Cookson*, and *ex parte James*, clearly lay down what the law of England upon this point is. And it is observable that Lord ELDON, both in *ex parte James* and in *ex parte Lace*, goes even further than Lord HARDWICKE did in *Whelpdale v. Cookson*, and considers (though he expresses it, no doubt, with the respect due to that eminent judge, rather as a grave doubt than as a well-matured opinion) that Lord HARDWICKE had scarcely given full effect to the principle, when he said that it was possible that the assent of the creditors might validate the sale (a).

How far the two systems of law are the same upon this very important question, appears not only from the case of the *York Buildings Company v. Mackenzie*, which is the ruling case upon this subject, and which was decided upon an appeal from Scotland, and according to the principles of Scotch law, in this House; but it also appears from the fact that in that case a distinct reference was made to the English law authorities, and to the very case before Lord HARDWICKE, of *Whelpdale v. Cookson*. The case of *ex parte James*, indeed, could not have been there cited, because it was not decided till 1803; but the case of *Whelpdale v. Cookson* is referred to in the argument at the Scotch bar, and in the printed Appeal Cases; and so likewise is the passage from the Pandects, which my noble and learned friend has read.

(a) What Lord HARDWICKE said was, the “majority of the creditors;” and this was apparent by what Lord ELDON dissented from. 6 Vesey, 628.

It is also to be observed, that not only were the English cases cited in Scotland, in that instance, but, conversely, the Scotch case of the *York Buildings Company v. Mackenzie* has been referred to since, in the English cases, repeatedly, at the bar, and once or twice, I think, by Lord ELDON himself, in disposing of English cases.

My Lords, the judgment in the *York Buildings Company v. Mackenzie* was after eleven years of possession; and it is remarkable, too, that there was no fraud whatever found imputable to Mr. Mackenzie, the purchaser. I think that in the account of the subsequent proceedings, though not in the court below, it appears that so entirely *bona fide* was Mr. Mackenzie's possession found to have been, that the rule of the civil law, happily the rule in Scotland, though most unfortunately never introduced into our jurisprudence, namely, that "*Fruges bona fide perceptæ et consumptæ*" are held to be the property of the party who is ultimately found not to have the title, was applied in the case of Mackenzie. So entirely free from all imputation of fraud was he found to be, that he was allowed to remain in undisputed and undisturbed possession of the rents and profits of the estate during those eleven years—that is, up to the period of the judgment on the appeal—because the rule applies not only to the extent that the *bona fides* avails the party in possession up to the time of a decree against him in the court below, but his right to the possession of the "*fruges bona fide perceptæ et consumptæ*" is held to inure up to the final decision in the Court of Appeal. And, accordingly, Mr. Mackenzie's *bona fides* was found to have been so unimpeachable in the case, and his conduct in the whole transaction was found to have been so entirely without fraud, that not only did the court below find the other party liable to costs, because they had charged him with fraud, but afterward he was adjudged to have the whole of the expenses allowed him to which he had been put in ornamental improvements upon the estate (a). That is certainly one very strong instance of the application of the rule; perhaps it is stronger than any other within our recollection, because in that case it clearly shows that so entirely was the opinion of the

(a) It appears that there were three more appeals by the company against Mr. Mackenzie, in all of which they were unsuccessful.

Court in favor of the rule, that even while they held that the transaction could not be sustained, but that the purchase was invalid, they nevertheless decreed the purchaser possession of the rents and profits, and also to be allowed for the expenses of ornamental improvement.

In that case, my Lords, I must also observe that it was not merely the decision of this House which set the court below right upon a point of Scotch law, as it has once and again done; but the Scotch law appears to have been by no means distinctly and uniformly maintained by the court below to be, as it was ultimately found *not to be*, by your Lordships' decision. It was an action of reduction for setting aside the sale; and, in the first instance, the court below decided against the pursuers, and repelled the reasons for reduction. On a reclaiming petition, however, the court, by a narrow majority, sustained the reasons of reduction, and set aside the sale. Then again came both parties to reclaim against this second decision; and, by a narrow majority again, the court assoilzied the defender, and found, as I have already stated, that, in respect of the charge of fraud, the defender, Mr. Mackenzie, was entitled to his expenses. Therefore, it can not be said to have been at all the understanding of the Court of Session that the law was clearly in favor of such purchases at the time, when you find these two conflicting decisions in the court below, and each by such a very narrow majority. At that time, unfortunately, the course of reporting in Scotland was that the judge's opinions were not given; and it is only accidentally and rarely that you find any reference made to what passed upon the bench; but in this case it is stated, in the report, that several of the judges expressed a strong opinion against the validity of the purchase, and the reasons are given. And the very ground which had been urged for sustaining the purchase, and the validity of the transaction; namely, that in judicial sales it had been a very usual practice for common agents to become the purchasers, and that though in eighteen out of one hundred and thirty-five instances they became the purchasers, yet no instance had been found of an attempt made, or certainly of an attempt succeeding, to set aside such a purchase (but the report would rather go the length of stating that no instance had been found of an attempt made to

set aside any such purchase)—the learned judges, I say, who held such purchases illegal, were of opinion that the occurrence of them in practice was a ground which afforded all the stronger reason for the court laying down what the law of honesty and what the law of common sense was, in disapproving of such transactions (a).

My Lords, I also agree with my noble and learned friend that the decision in the case of *Foster v. the Wolverhampton Company*, in the Common Pleas, upon which great reliance was placed, and which appears, to a certain degree at least, to have been the ruling decision in the court below, does not apply to this case; because there the transaction was, past all doubt, valid at common law, though not in equity—but had the Court of Common Pleas had an equitable jurisdiction as well as a common law jurisdiction, the anomaly never could have happened of a transaction being found legal and valid in that court

(a) HISTORY OF THE YORK BUILDINGS COMPANY CASE.

[This very interesting note is added from the report in 1 M'Queen, 481.]

The case of the *York Buildings Company v. Mackenzie*, so far as its legal principle is concerned, is better known and more attended to in England than in Scotland. The argument at the bar of the House of Lords (during two sessions of Parliament, 1794 and 1795) lasted sixteen days. Judgment was given on the seventeenth. Lord LOUGHBOROUGH was indeed chancellor then; but the tradition (there is no report) is that Lord THURLOW (who had decided *Fox v. Mackreth* very shortly before) took the chief part in the hearing and deliberation. He is recorded in the journals of the House as present every day. The judgment pronounced is not a mere reversal, but is followed by elaborate prospective and retrospective directions, drawn after the fashion of a chancery decree. Lord ELDON and Sir WILLIAM GRANT, 3 Vesey, 746, designate it as the great case of *York Buildings Company v. Mackenzie*; and Lord ST. LEONARDS, in his *Vend. and Pur.* Vol. 3, 240, calls it likewise the *great case*, and refers to it repeatedly. Messrs. White and Tudor cite it in their *Leading Equity Cases*, Vol. 1, 72, 109; but Mr. Ross omits it in his similar work on Scotch Law—a circumstance which is mentioned, not as impeaching that most useful collection, but simply as showing that this case, which has always been regarded as a ruling authority in England, is comparatively forgotten in the country from whence it came. Mr. Forsyth, indeed, in his learned work on the Law of Trusts in Scotland, gives somewhat of a legislative character to the *York Buildings Company v. Mackenzie*, by observing that “it introduced a principle into the Scotch law from that of England;” which is all he has to say of it, and which shows how little the case has been adverted to in the Court of Session. And yet the “borrowing of principle,” to which Mr. Forsyth refers, has been by the law of England; which, till the decision of this Scotch appeal, was very barren on the point in question, as

which could not stand an examination on the other side of Westminster Hall. It has not often occurred to me to see a stronger instance of the great inconvenience, to say the very least of it, of that division between the two sides of Westminster Hall—I will not say that impassible barrier between them, for, on the contrary, the barrier is constantly, and must be for the sake of justice constantly, passed—but I have seldom seen a more striking instance of the inconvenience of the existence of that division, and of not allowing the court to exercise both jurisdictions, at all events whenever a case arises in which entire justice can not be done without the exercise of both jurisdictions.

My Lords, upon the whole, I entirely agree with my noble and learned friend, that there has been here a miscarriage in the court below, and that the *Interlocutor* in this case should be reversed.

may be seen from the meager case of *Keech v. Sanford*, decided by Lord KING in 1736. See Browne's Parl. Cases, Vol. 3, 42, and Morr. Dict. 13, 337.

The counsel in the *York Buildings Company v. Mackenzie* were, for the appellants, *R. Dundas*, *James Mansfield* (afterward Chief Justice of the Common Pleas), and *J. Mackintosh*; and for the respondents, the *Attorney-General* (*Scott*, afterward Lord ELDON), *R. Blair* (afterward Lord President), *W. Grant* (afterward Master of the Rolls), *W. Miller*, and *W. Adam*.

The York Buildings Company had purchased from the crown certain estates which had been confiscated for the rebellion of 1745. They carried on certain works on them, and in process of time became bankrupt and were sequestrated. Their estates, or some of them, were sold by public auction, under the management of Mr. Mackenzie, a writer to the signet, as common agent for creditors. At one of the sales he was himself the purchaser. The decision is that he ought not to have been so, having regard to his fiduciary position.

In the last century, sixteen days' hearing in the House of Lords meant sixteen *half* days. The lord chancellor went first to his own court, and did not take his place on the woolsack till one or two o'clock. It was generally two before business began.

Since writing the above, I have received from Mr. David Robertson a note, saying: "I have a strong recollection of the very impressive speech of Lord THURLOW on the appeal, *York Buildings Company v. Mackenzie*. I was present. Lord LOUGHBOROUGH, the chancellor, spoke after Lord THURLOW.

HOFFMAN STEAM COAL COMPANY v. CUMBERLAND COAL AND
IRON COMPANY (a).

[*This case was decided at the June term, 1860, of the Maryland Court of Appeals, composed of Chief Justice JOHN C. LE GRAND, and Associates WM. H. TUCK, JAMES L. BARTOL, and JOHN B. ECCLESTON, and reported in the 16 vol. Maryland Reports, 456.*]

A director of a corporation, at the time of the sale of part of its property was contemplated and made, and who actively participated in all the measures

(a) The same subject-matters of litigation were decided by the Supreme Court of New York, at a special term held in January, 1859, in a case in which the *Cumberland Coal and Iron Company* was plaintiff, and *Sherman, Dean, and Postly* were defendants. It is reported in 30 Barbour, 553, to which reference is made for a full report. In consequence of the importance of the principles involved, and the clearness and great ability of the decision of Justice HENRY E. DAVIES therein, it was at first determined to reproduce the New York decision in full. But much of it being a careful consideration and affirmation of the leading cases already given herein, and of the many others therein cited, this would be taking too much space, although it would be justified by the intrinsic merits of the decision and the great principles reaffirmed therein. The syllabus of the New York decision is given, to show the concurrence of the courts of the two states; and in a subsequent note to the Maryland Report is appended so much of Judge DAVIES's opinion as treats of the alleged *confirmation* or *ratification* of the acts of *Sherman* by the stockholders of the *Cumberland Coal Company*:

SYNOPSIS.—“An agent, employed to examine and ascertain how much and what part of the lands of his principal can be sold without inconvenience, and to set off by metes and bounds such portions as he in his judgment shall deem advisable, and to report his proceedings to his principal, can not, after examining the property and recommending a sale of a portion thereof, purchase the property himself, and take a conveyance thereof for his own benefit. And if such agent, after so purchasing the property, organizes a company, in which he becomes a director and a large stockholder, and transfers and conveys the land, and assigns a contract relating to it, to such company, the company will be charged with notice of the facts and circumstances attending the purchase by its grantor, and will stand in no better position than he occupies.

“Under such circumstances, the principal is entitled, at his option, to have the sale to its agent vacated and set aside, both as against the agent himself and those to whom he has conveyed with notice of the facts. And, as an agent is incapacitated to purchase for himself, so is he also incapacitated to act for another person in making the purchase.

“A director of a corporation is the agent or trustee of the stockholders, and as such has duties to discharge, of a fiduciary nature, toward the principal; and is subject to the obligations and disabilities incident to that relation.

“What will amount to a confirmation or ratification, by the stockholders of a corporation, of a sale made by its directors.”

tending to its completion, and had full knowledge of all the circumstances attending its progress, is *not competent* to become a *purchaser* of such property, and the sale to him can not be upheld, if resisted by the corporation.

A party joining in a purchase from a corporation, with knowledge of the fact that his co-purchaser was a director of the corporation, is affected with whatever of legal disability belonged to the director by reason of that relation.

A director, having purchased lands from a corporation, united with others in forming a new corporation, he subscribing for almost all of the stock therein, and becoming one of its officers and directors, and on the next day, in pursuance of one entire plan, conveyed the same lands to the new company in payment of his subscription for such stock.

Held, that the new company is affected with notice of the circumstances impairing the title of the party so conveying the lands to it, and can not claim to be a *bona fide* purchaser without notice.

Trustees can not purchase at their own sales, either directly or indirectly, and if they do, such purchase will be set aside on the proper and reasonable application of the parties interested.

The same doctrine applies to purchases by persons acting in any fiduciary capacity, which imposes on them the obligation of obtaining the best terms for the vendor, or which has enabled them to acquire a knowledge of the property. A director of a corporation holds such a relation to its stockholders.

To render the ratification of such a sale effective and conclusive, the principal must, at the time of the ratification, be fully aware of every material fact, and his act of ratification be an independent substantive act, founded on complete information, and he must not only be aware of the facts, *but apprized of the law as to how these facts would be dealt with if brought before a court of equity.*

Where a purchaser, with notice from a trustee, conveys, for a valuable consideration, to another person who has no notice of the trust, the estate will not be affected with the trust in the hands of the second purchaser.

Wm. Schley, for appellant. Geo. A. Thruston and Geo. W. Dobbin, for appellee.

LE GRAND, Chief Justice, delivered the opinion of this Court.

This is an appeal from an order granting an injunction, and from a subsequent order continuing the same, upon the hearing of a motion to dissolve, passed by the Circuit Court of Alleghany County, in an equity cause therein depending, in which the *Cumberland Coal and Iron Company* was the complainant, and *Allen M. Sherman, William B. Dean, and the Hoffman Steam Coal Company*, were defendants. The motion to dissolve was made by all the defendants, and being overruled in the opinion of the court, after an amendment was made to the bill of complaint, the formal order was filed, the amended bill having

been answered by all the defendants. The Hoffman Steam Coal Company alone appealed.

The object of the bill is, to cause to have declared null and void certain deeds of lands from the complainant to Messrs. Sherman and Dean, and the cancellation of a contract entered into with them by the complainant, for the transportation of coal, etc., over a railroad belonging to the latter. And also, to procure a transfer of the aforesaid lands to the complainant, the same having been conveyed, as also the contract of transportation, to the appellant. The bill prays an accounting on the part of the defendants, as to the coal, etc., which have been mined and transported from the lands mentioned in the proceedings; and also, an injunction restraining the disposition and sale of any of said lands, the stock of the appellant, or the transfer of the contract relating to transportation.

The whole equity of the complainant rests on two principal allegations. *First*, fraud *in fact*, on the part of Sherman and Dean, in their dealings with the property of the complainant; and *second*, that if there be no such fraud *in fact*, as to vitiate the whole transaction, the *law*, under the circumstances of this case, imputes such knowledge to the appellant, of the relation of Sherman to the complainant and the course of his proceedings, as will affect its title with whatever infirmity belonged to his title.

The principal and operative facts detailed in the bill of complaint may be thus stated:

The complainant was incorporated by the state of Maryland, at December session, 1840. Andrew Mehaffey was its president from the 20th of March, 1854, to the 7th of June, 1858. Sherman became a director, by an election to fill a vacancy, on the 21st of February, 1855, and continued to be such until the 29th of May, 1858. On the 4th of April, 1855, Sherman was appointed chairman of a committee to prepare by-laws; and as such, on the 4th day of June, 1855, reported to a meeting of stockholders, that an executive committee should be created, to be constituted of three directors, two of whom to form a quorum, the committee to be appointed exclusively by the president; that in pursuance of the authority conferred upon him by the adoption of the report, the president, Mehaffey, appointed

Messrs. Sherman, Francis Bloodgood, and Joseph Torrey an executive committee, and as such they continued to act until the 29th day of May, 1858, but they never kept any record of their proceedings. That, on the 9th day of October, 1855, Sherman, at a meeting of the board of directors of the complainant, held in the city of New York, proposed for the adoption of the directors, which was done, the following resolution: "*Resolved*, That the president appoint a committee of five directors, whose duty it shall be to proceed to the company's property in Maryland, and ascertain how much and what part of their lands can be sold without interfering with the working and facilities of the company; and, if practicable, that they apportion and set off, by metes and bounds, such portions as they, in their judgment, shall deem advisable, and report the result of their commission to this board at the earliest day practicable." Sherman was appointed chairman of the committee, having associated with him on it Joseph Torrey, M. N. Falls, William Petit, and Francis Bloodgood. This committee was appointed by the president, Mehaffey, who, on motion, was added to it. Only Sherman, Mehaffey, and Petit acted and visited the lands. On the 11th of December, 1855, they made a report recommending a sale of a portion of the lands of the complainant; a resolution was passed authorizing a sale of land for \$200,000. On the 15th of January, 1856, another resolution was passed, which, after referring to that of the 11th of December, and declaring its execution to have been found impracticable, proceeds as follows: "It is understood that a sale of a less quantity of land for \$150,000, or thereabout, may be effected, which sale, it is believed, will accomplish all the ends, etc.; therefore, *Resolved*, That the president and secretary be, and they are hereby, authorized and directed to make such sale, by executing a deed of the land to be sold, and to make and execute such covenants and agreements, on the part of and in the behalf of this company, and as they may deem necessary to accomplish the ends above mentioned. *Resolved*, That the president be, and he is hereby, authorized to modify the terms and conditions of such sale, in his discretion, if he shall deem it necessary to the accomplishment of such sale."

On the 22d of April, 1856, at the city of New York, a deed

of conveyance of certain lands belonging to the complainant, and therein described, and a certain agreement relating to transportation, were executed and delivered by Mehaffey, as president, to Sherman and Dean. • This transaction was, on the 13th of May, 1856, reported to a meeting of the directors of the Cumberland Coal and Iron Company; and according to the minutes of its proceedings, "after explanation," it, as well as the acts of the president and secretary, were, by the board, "unanimously approved," and a copy of the deed, together with the agreement entered into, directed to be placed on file for future reference.

On the 19th day of August, 1858, the Hoffman Steam Coal Company, of Alleghany County, was formed, under the act of Assembly of this state, of 1852, chap. 322. On the 20th of August, 1858, Sherman and wife, and Dean, conveyed to the Hoffman Company the land which had been conveyed by Mehaffey to Sherman and Dean; and, according to the bill, were about "to execute and deliver to the said company an assignment of the aforesaid contract for transportation, or other instrument purporting to impart to the said company rights under and by virtue of the said contract." The bill alleges the capital stock of the Hoffman Company to consist of 5,000 shares, of which they charge, "on information and belief," Sherman and Dean became subscribers to the number of 4,990 shares; that Sherman was a subscriber for about five-eighths of the shares, and Dean for about three-eighths of the shares; and that the other two [ten] shares were nominally taken by other parties for the purpose of enabling the said parties to participate in the formation of the said company, and become directors thereof. The bill charges that Sherman, in the form of stock issued by the Hoffman Company, still retains his interest in the lands mentioned in the deeds executed by the president of the complainant, and also in the contract of transportation; and that he retains possession of the deed and contract; that he is an officer as well as director of the company, and has and exercises entire practical control of the company; and that the change or conversion of his ownership in the lands into an interest in the stock is a fraudulent device, for the purpose and with the design of evading the jurisdiction and process of the court. It also charges that the

Hoffman Company had, before the execution and delivery to the said company of the deed by Sherman and Dean, and before the formation of any company, whereby the said company was to acquire or enjoy any of the advantages conferred by the said contract for transportation, and that the defendant Dean also had, before he entered into the purchase of the lands, or into the contract for transportation, full notice of the frauds in said sale, in the procurement, origin, formation, execution, and delivery of the deed, and of the contract for transportation, and of all the facts relating thereto.

In addition to the fraud alleged in the procurement of the deed and contract by Sherman, the bill alleges the price agreed to be paid for the land to be grossly inadequate, and the terms of the contract of transportation to be ruinous to the Cumberland Coal and Iron Company. It also denies there has been a payment according to the terms of the purchase, and asserts that Dean was but a mere "representative man," by which is meant one without pecuniary substance.

The gravamen of the bill is, that Sherman, with others, but principally with Mehaffey, conspired to despoil the complainant of its property by proceedings conducted by them as its officers, and that full knowledge of all the facts and circumstances was had by the Hoffman Company, Sherman being practically and really the company; and that, whether or not there be sufficient evidence of fraud in fact, on the part of those charged with it, nevertheless, in the contemplation of the law, the transaction is such as will be declared null and void and of non-effect, on grounds of public policy.

Sherman and Dean, in their answers, deny all fraud, the latter disclaiming all knowledge of Sherman or of his transactions, until he became connected with the purchase of the land. The Hoffman Company, in its answer, sworn to by its president, S. Brooke Postly, admits the formation of the company, and that Sherman and Dean conjointly took the capital stock thereof to the extent of 4,990 shares, and avers that the other ten shares were, at the same time, subscribed for by other parties, and denies that it is true that the said ten shares were nominally subscribed for by said other parties, and says they were paid for by such other parties, and were not subscribed for on behalf of

Sherman and Dean, or either of them. It states that Sherman and Dean have since sold, actually and *bona fide*, a large part of their stock, so that they are not the large holders they originally were. It denies the frauds alleged in relation to the conveyance and contract of transportation, and insists that even if they existed, the company had no knowledge of them, but became the purchaser of said property, and assignee of said contract of transportation, *bona fide* and for a full and valuable consideration. It admits the mining of coal on the property, and sets up, as a confirmation of the original deed and contract, the fact of the receipt by the complainant of the price of transporting under the contract.

A great deal of testimony was taken on the side of the complainant, to show what is alleged to be the unconscionable character of the contract; and that what was done at the meeting of the stockholders of the Cumberland Coal and Iron Company, held on the 1st of June, 1857, other than the voting for president and directors, was unauthorized, and that of 27,997 votes cast, 22,508 were given by proxy; that the parties voting by proxies were only empowered to vote for president and directors, and several parties were examined to show that they, as stockholders, had no knowledge whatever of the conveyance to, and contract with, Sherman and Dean, and never intended to ratify them. It is not necessary the testimony, on the one side or the other, should be critically examined, inasmuch as on this appeal the chief inquiry will be, whether the Hoffman Company has a standing in court as an independent litigant, and as a *bona fide* purchaser for value, and without notice of the circumstances preceding and conducing to its acquisition of title.

Much was said, and earnestly said, in argument, in impeachment of the integrity of the actors in these transactions, and especially in the arraignment of the honesty of Sherman and Mehaffey; fraud, studied and systematic, was imputed to them throughout the whole of their dealing with the matters involved in this controversy. Whatever may have been their true motives of action, the facts disclosed in evidence do not demand that we should brand them as willfully dishonest. One of the most distinctive features in the history of the development of the mineral regions of our state, has been the insane spirit of

speculation which has characterized it at almost every step. Honest men, as well as dishonest men, uninfluenced by the disastrous failures of their predecessors, have from time to time embarked in enterprises, under the delusive hope of speedily, and as it were by magic, realizing princely fortunes, and have only been awakened to a sense of the unreality of their calculations and hopes by the crash occasioned by their utter prostration and ruin. This spirit of wild speculation ordinarily blinds those who are engaged in it, and subjects them to the condition in which they are unable to see things as others see them. Legal disabilities rarely occur to them; it being, with most of them, an axiom of public or political economy, that the exchange of one article for another, at fictitious rates, and without the bestowal of labor on either, increases the value of both. Men involved in transactions of this kind very frequently, without the slightest consciousness of dishonesty of purpose, do things which the law condemns, and which it declares to be of no value. It is to guard against this proneness to a non-observance of what is strictly right and proper in the dealings of corporations, the law has wisely interposed its checks and prohibitions; and we think, in the present aspect of this case, these are all sufficient to justify the action of the Circuit Court, without staining the reputation of any of the parties to the controversy with fraud or perjury. Uprightness and integrity of character are too precious a possession to be dealt with lightly anywhere, and ought not especially to be sullied by the judgment of a court of justice, except on clear and conclusive evidence.

The first matter of inquiry is, the nature and legal effect of the transactions of Sherman with the Cumberland Coal and Iron Company. The whole evidence incontestably establishes these facts:

1. That Sherman was a director of the Cumberland Coal and Iron Company, from the 21st of February, 1855, to the 29th of May, 1858.

2. That on the 9th of October, 1855, on motion of Sherman, a committee was appointed to visit the lands of the company in Maryland, and report on the expediency of selling a portion of them, and of which committee he acted as chairman, and as the organ of which he recommended a sale, etc.

3. That on the 22d of April, 1856, Sherman received the deed to himself and Dean for the land, and the contract relating to the transportation over the railroad of complainant.

It thus appears that Sherman was a director in the Cumberland Coal and Iron Company from the incipency of the project to dispose of a part of its property down to its consummation, and so remained for more than two years thereafter. He actively participated in all measures tending to the completion of the sale, and of course had full knowledge of all the circumstances attendant on its progress. About this the documentary proof allows of not a shadow of doubt. Under this state of case the question is, whether Sherman was competent to become a purchaser of the property of the plaintiff.

In considering the capacities of a trustee to purchase the property of his *cestui que trust*, the authorities regard them under two classifications: *first*, where a trustee buys or contracts with himself, or several trustees, of which he is one, or a board of trustees; *second*, where the dealing of the trustee is with a *cestui que trust*, who *sui juris*, and competent to deal independently of the trustee in respect to the trust estate.

Whether the transactions of Sherman be considered under the one or the other head, is immaterial so far as this appeal is concerned; for in our judgment, in either case, they can not be upheld, if resisted. The distinction between the two classes of cases consists in this: that in the *first*, the contract is voidable *absolutely*, at the instance of the *cestui que trust*, without regard to its fairness; while in the *second*, although the presumptions of the law are against the contract, yet permission is given to the trustee to show the perfect *bona fides* of the transactions and circumstances relieving it from the censure of the law. This is a distinction recognized in most of the books, but it is not universally so. So far from it, some of the cases insist, with great earnestness, that the governing principle ought to be, and is, the same in both cases. It is not necessary we should investigate the solidity of this last-mentioned doctrine; for, whether the dealings of Sherman belong to the one or the other class, they equally fall under the correction of a court of equity.

The necessity of *good faith*—and that free from suspicion, as far as practicable—between the principal and agent, is the main

pillar of support to the doctrine. The necessity of it underlies all the decisions. Remembering the weakness of humanity, its liability to be seduced, by self-interest, from the straight line of duty, the sages of the law inculcate and enjoin a strict observance of the Divine precept, "Lead us not into temptation."

In this state, as elsewhere, it is well settled that trustees can not purchase at their own sales, either directly or indirectly; and if they do, such purchase will be set aside, on the proper and reasonable application of the parties interested. *Richardson v. Jones*, 3 Gill and Johnson, 184. This doctrine, which is applicable to trustees, applies also to purchases by persons acting in any fiduciary capacity which imposes upon them the obligation of obtaining the best terms for the vendor, or which has enabled them to acquire a knowledge of the property. The authorities supporting it are numerous and uncontradictory. They will be found brought together, to a considerable number, in the notes to the case of *Fox v. Mackreth*, 1 White and Tudor's Leading Equity Cases, 105. A director in a company holds such a relation to its stockholders. The House of Lords, in the case of the *Aberdeen Railway Company v. Blaikie*, 1 M'Queen, 461, held that a contract, entered into by a manufacturer for the supply of iron furnishings to a railway company, of which he was a director, or the chairman, at the date of the contract, was invalid, and not enforceable against the company; and Lord CRANWORTH, in delivering the opinion, said: "A corporate body can only act by agents, and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such an agent has duties to discharge of a fiduciary character toward his principal; and it is a rule of universal application, that no one having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. It obviously is, or may be, impossible to demonstrate how far, in any particular case, the terms of such a contract have been the best for the *cestui que trust* which it was possible to obtain. It may some-

times happen that the terms on which a trustee has dealt, or attempted to deal, with the estate or interests of those for whom he is a trustee, have been as good as could have been obtained from any other person; they may even, at the time, have been better. But still, so inflexible is the rule that no inquiry on that subject is permitted. The English authorities on this subject are numerous and uniform." The same views are expressed in the case of *Michoud v. Girod*, 4 Howard, 503, a case elaborately discussed by counsel and court. "The rule," say the court, "embraces every relation in which there may arise a conflict between the duty which the vendor or purchaser owes to the persons with whom he is dealing, or on whose account he is acting, and his own individual interest."

These citations are sufficient to show, that the dealings of the defendant Sherman with the property of the complainant, fall directly within the prohibition of the rule, and as a consequence, obnoxious to disavowal.

But it is said, however this may be, the whole transaction was fully ratified and confirmed by the complainant, which ratification and confirmation relieved it from all legal infirmity. An attentive consideration of its whole history, as detailed in the record, has not brought us to this opinion. The law governing questions of ratification in cases like the present, is well settled. To render the act of ratification effective and conclusive, certain considerations are necessary. At the time of the supposed ratification, the principal must have been *fully* aware of every material circumstance of the transaction, the real value of the subject of the contract, and his act of ratification must have been an independent and substantive act, founded on complete information, and of perfect freedom of volition. And, in addition to all this, the *cestui que trust* must not only have been acquainted with the facts, *but apprized of the law, how those facts would be dealt with if brought before a court of equity.* Lewen on Trusts (ed. of 1858), 615.

This last requisite, it is nowhere shown in the proof, has been complied with. But, on the contrary, it is fairly to be inferred that the stockholders believed they were concluded by what had been done, and this inference is particularly strengthened by the circumstance that the modification in the contract

of transportation was solicited and granted, not as a matter of right, but as a concession on the part of the beneficiaries under it. In this view, it is not necessary we should dwell more fully on the other facts attending the negotiation and sale. Such commentary properly belongs to the final hearing (a).

(a) WHAT IS A CONFIRMATION OR RATIFICATION BY THE BENEFICIARY?—Judge DAVIES, in *Cumberland Coal Company v. Sherman*, 30 Barbour, 574, after considering the circumstances of the case, says:

"I can not therefore, upon these facts and principles, say that this sale can be upheld, even if it had been made by the *cestui que trust* directly. But it is said that the stockholders, at the meeting of June, 1857, ratified and confirmed the sale and contract. It must be borne in mind that at this meeting the stockholders were dealing with their trustee, and that all the duties incumbent on him, when negotiating a purchase from his *cestui que trust*, devolved with equal force on him when seeking a ratification of a sale made to him by himself as a trustee, with the aid of his co-trustees. I am now regarding the law as applicable to a ratification made by stockholders themselves, or a majority of them. I shall hereafter consider whether a majority of the stockholders made such ratification, and whether it was competent for the majority to make the same, or to bind the minority. The rules as to confirmation of a sale to a trustee by the *cestui que trust*, are concisely laid down in Lewin on Trusts, 97 Law Lib. 402. They are: '1. The confirming party must be *sui juris*, not laboring under any disability, as infancy or coverture. 2. The confirmation must be a solemn and deliberative act—not, for instance, fished out from some expressions in a letter; and particularly when the original transaction was infected with fraud, the confirmation of it is so inconsistent with justice, and so likely to be accompanied with imposition, that the court will watch it with the utmost strictness, and not allow it to stand but on the very clearest evidence. 3. There must be no *suppressio veri*, or *suggestio falsi*, but the *cestui que trust* must be honestly made acquainted with all the material circumstances of the case. 4. The confirming party must not be ignorant of the law; that is, he must be aware that the transaction is of such a character that he could impeach it in a court of equity. 5. The confirmation must be wholly distinct from, and independent of, the original contract—not a conveyance of the estate, executed in pursuance of a covenant in the original deed for further assurance. 6. The confirmation must not be wrung from the *cestui que trust* by distress or terror. 7. When the *cestuis que trust* are a class of persons, as creditors, the sanction of the major part will not be obligatory on the rest; but the confirmation, to be complete, must be the joint act of the whole body.' All these positions are sustained by numerous authorities, and are believed to be sound law, and of universal recognition.

"Applying these principles to the present case, has the party seeking the confirmation of the stockholders to this sale and contract shown that these essential prerequisites have been complied with on his part? I do not understand it to be pretended that all the facts and circumstances of the case were made known to the stockholders at this time. It is not asserted that the statement made by Mehafeey to the stockholders, at their meeting in June, 1856, that the whole consideration of this sale, \$140,000, had been paid in money, and that \$112,000

As to Dean, it is only necessary to observe, that it is impossible to believe he was ignorant, when he became associated in the transaction, of the fact that Sherman was a director in the Cumberland Coal and Iron Company. We can not suppose him to have become a party to a contract, involving enormous sums

thereof had been applied in the extinguishing of that amount of bonds of the plaintiff, and which was undeniably incorrect, and well calculated to deceive and impose on the stockholders, was in fact untrue, and they so understood it. Can I assume that the defendant Sherman was ignorant of this report, and this incorrect statement? If he had knowledge of them, it was clearly his duty, when he sought the stockholders to obtain from them a confirmation of this sale, to have made them acquainted with the material facts as they truly existed. Not having done so, it was a *suppressio veri*; and, whether made designedly or not, is equally fatal, and the confirmation, if obtained, will not avail him. The confirmation must not have been made in *pursuance* of the original transaction, or under the influence of that transaction, *Wood v. Downes*, 18 Vesey, 125; or under the same state of circumstances which produced that transaction, *Crowe v. Ballard*, 1 Id. 215. A confirmation given under the idea that the original transaction was valid, when it was not, will be set aside, *Roche v. O'Brien*, 1 Ball & Beat. 338; *Gowland v. De Taria*, 17 Vesey, 18; *Dunbar v. Frederick*, 2 Ball & Beat. 317.

"It is very doubtful, I think, whether the confirmation or ratification of June, 1857, if made with all the conditions and under all the circumstances required, was an act either of the corporation or of the stockholders. To make it binding on the former, there must have been, according to the charter, a quorum of the stockholders; and in corporations having stock, each share is deemed a stockholder, and a majority of shares present or represented is a majority of the stockholders. A very large proportion of stockholders represented at that meeting were there by attorney, and the power given only authorized them to vote for the election of directors. It did not authorize them to bind their principals to acts, and in reference to matters, not authorized or assumed by the power. The ratification or confirmation by such attorneys or agents, having no power to act in the premises, neither bound the corporation nor the stockholders for whom they thus, without any authority, assumed to act.

"But even if the confirmation had been legally made, and by a majority of the stockholders, which it clearly was not, when as in this case, it was to be made by a class, the sanction of a major part will not be obligatory on the rest; but the confirmation, to be complete, must be the joint act of the whole body. *Ex parte Hughes*, 6 Vesey, 622; *ex parte Lacey*, Id. 628; *ex parte James*, 8 Id. 337; *Davoue v. Fanning*, 2 Johns. Ch. 264.

"At the meeting of June, 1857, certain stipulations of the transportation contracts were relinquished by the defendant Sherman, and it is contended that the acceptance of this release bound the corporation and the stockholders to the contracts, and operated as a ratification of the same. What would have been its effect had the defendant Sherman stood in the attitude of a stranger to the plaintiffs and the stockholders, it is not necessary to determine. But in view of their actual relations, and in accordance with the principles above stated, as applicable to confirmations in such cases, it can have no binding effect. Sherman, in his affidavit, speaks of the release proposed to be given, as 'his concession or

of money and great liabilities, without some knowledge of the existence and organization of the corporation with which he was dealing to so great an extent. Imputing to him the possession of ordinary intelligence, and judging of his transactions by the rules which usually influence human conduct, when taken in

consent to modify' the original transaction. He also says that when Grosvenor, one of the stockholders, questioned the transaction, he (Grosvenor) admitted that the plaintiffs 'had no claim on said Sherman and Dean to change or modify said agreement. . . . And thereupon Sherman consented to make said modification.' Mehaffey swears that 'he did not contemplate' the subject coming up at the stockholders' meeting in June, 1857; that 'on the contrary he regarded it as having been definitely settled, approved of, and ratified by the stockholders;' that it was bought up by Grosvenor; 'that said Grosvenor observed that whilst the stockholders had no claim, and could not claim it as a right, that Sherman and Dean should modify said contract,' etc. Riley, a stockholder, who attended the meeting in June, 1857, says that he was not aware, nor does he believe that any of the stockholders were aware, of their legal rights, or that they had any claim to have the deed and contracts, to use his own expression, 'ripped up;' that no resolution was passed or offered at said meeting approving said contracts and sale.

"It is very apparent that no actual ratification or confirmation took place, and I am unable to see that any thing was done which would authorize one to be implied. Even if obtained, Sherman was dealing with his *cestuis que trust*, and standing on the original transaction, claiming its validity and binding character; and his *cestuis que trust* believing it so to be, he is debarred, on the authority of the cases already cited, from claiming any benefits from such confirmation, even if it had been made as distinctly and unequivocally as he pretends.

"After a most patient investigation of the facts in this case, and the numerous authorities cited in the protracted and very able arguments made by the learned counsel for the respective parties in this cause, I have arrived at the conclusion, entirely clear to my own mind, that this deed of sale and contract can not be sustained. To hold otherwise, would be to overturn principles of equity which have been regarded as well settled since the days of Lord Keeper BRIDGEMAN, in the 22d of Charles II, to the present time—principles enunciated and enforced by HARDWICKE, THURLOW, LOUGHBOROUGH, ELDON, CRANWORTH, STORY, and KENT, and which the highest courts in our country have declared to be founded on immutable truth and justice, and to stand upon our great moral obligation to refrain from placing ourselves in relations which excite a conflict between self-interest and integrity.

"I have arrived at this result without considering the question of fraud raised in the complaint, and denied by the answering affidavits. I have chosen to place my decision on higher and more satisfactory grounds. I adopt the language of Lord ELDON, in *ex parte James*, 8 Vesey, 345: 'It rests upon this, that the purchase is not permitted in any case, however honest the circumstances, the general interests of justice requiring it to be destroyed in every instance, as no court is equal to the examination and ascertainment of the truth, in much the greater number of cases.' There may be fraud, as Lord HARDWICKE observed,

connection with all the facts and circumstances surrounding him, we are led to the conclusion that he had knowledge of the relation which Sherman bore to the Coal and Iron Company, and is, therefore, affected with whatever of legal disability belonged to Sherman, by reason of that relation.

But it is urged that however defective the title of Sherman and Dean may, under the circumstances, have been, the title of the Hoffman Steam Coal Company of Alleghany is, nevertheless, good and free from blemish, it having been acquired *bona fide* and without notice.

In view of the *facts* of *this* case, it is immaterial to inquire what would be the principles applicable to a case in which the defendant had, in point of fact, become possessed of title *bona fide*, and without notice of the circumstances impairing that claimed by those from whom it was derived. The facts of this case are too palpable to allow of conjecture, and they all show that, whatever knowledge Sherman had must have been possessed by the Hoffman Steam Coal Company of Alleghany

and the party not be able to prove it. To quote Chancellor KENT: 'It is to guard against this uncertainty and *hazard* of abuse, and to remove the trustee from temptation, that the rule does and will permit the *cestui que trust* to come at his *own option*, and without showing any actual injury, insist upon the experiment of a resale. This is a remedy which goes deep, and touches the very root of the evil. It is one that appears to me, from the cases which have been already cited, and from those which are to follow, to be most conclusively established.' The trustee purchased with this *clog* upon his title, and with a knowledge that his *cestui que trust* might, at his option, in the absence of all fraud, apply within a reasonable time to have the sale vacated.

"For the reasons herein stated, I have no doubt such are the rights of the present *cestui que trust*, the plaintiff in this suit, and it having established a *prima facie* right to have the deed and contracts canceled, and the lands sold reconveyed to them, it is my duty to restrain the defendants until the hearing of this cause, as asked for in the complaint and supplemental complaint.

"The plaintiff has the right to its real estate, or any thing into which it has been transmuted. It is therefore proper to restrain the defendants from transferring the stock owned by them in the Hoffman Coal Company, which but represents the real estate of the plaintiff, and the privileges and advantages secured by the transportation contract.

"The motion for an injunction is therefore granted."

See further as to election or confirmation, *Fillansbe v. Kilbreth*, 17 Illinois, 523, hereinafter reproduced, with the notes thereto appended. See also note to *Oliver v. Platt*, preceding, page 38, and same to *York and North Midland Railway Company v. Hudson*, preceding, page 72.

County. This company was incorporated under the act of 1852, on the 19th of August, 1858, and on the day following, the deed was made to it in pursuance clearly of one entire plan, Sherman and Dean becoming the owners of 4,996 of the 5,000 shares into which the capital stock was divided; it was, in fact, but a contrivance, whereby the same property was held by the same parties, but under a different name. The testimony of Shoemaker shows, that his ownership of one share was unreal; that he never did pay for it, and that his participation in the organization of the company was merely to oblige other parties, toward whom he held friendly relations; and notwithstanding the statement of Postly to the contrary, it is no violent presumption that others, whose names were used in the organization of the company, occupied the same relation to it as did Shoemaker. If the facts of this case were deemed insufficient to establish notice, then it is difficult, if not absolutely impossible, to imagine a combination of circumstances adequate to such a result. The whole case shows that, in the early stages of the existence of the appellant, so far as its property and transactions were concerned, it and Sherman were one and the same. In conveying to the Hoffman Company, he was but conveying to himself.

It appears from the evidence, that some of the shares in the stock of the Hoffman Steam Coal Company were held by other persons than Sherman and Dean prior to the 6th day of December, 1858, the date of the filing of the original bill, and it is contended, that as to them, they being *bona fide* holders without notice, the objections urged against Sherman and Dean are not applicable. There is no doubt that where a purchaser, with notice from a trustee, conveys for valuable consideration to another person, who has no notice of the trust, the estate will not be affected with the trust in the hands of the second purchaser, Hill on Trustees, 516 (marginal). But as to shareholders so situated, there is no question presented by this appeal. It is only as to the right of the appellant to ask a reversal of the order of the court, that we are now called upon to decide. We need not, therefore, look into the testimony for the purpose of discovering what number, if any, shares of stock were held by innocent parties before the filing of the bill.

We think the objections to the sufficiency of the bills of

complainant were properly disposed of by the judge of the Circuit Court. The charge of fraud is made specifically, and the invalidity of the deeds given subsequently to that of the 22d of April, 1856, is assailed on the same ground as is that.

We are of opinion there is an abundance in the case, as now made, to justify the continuance of the injunction until final hearing, and we accordingly affirm the orders of the Circuit Court, of the 25th day of May, 1859, refusing to dissolve the injunction, and also the order of the 3d day of October, 1859, overruling the motion, *made by the appellant*, to dissolve the injunction. **ORDERS AFFIRMED.**

ECCLESTON, J., delivered the following opinion: Without deciding whether, at the time Dean became first associated in the transaction mentioned in the proceedings, he was or was not ignorant of the fact that Sherman was a director in the Cumberland Coal and Iron Company, I think there is enough shown by this record to authorize the Court, in the exercise of its equitable discretion with regard to the dissolution of injunctions, to continue the present injunction until the final hearing. And therefore I concur with my brothers in affirming the orders appealed from.

DAVID C. MURREY, RECEIVER, ETC., v. CORNELIUS
VANDERBILT.

[*Decided in the Supreme Court of the State of New York, in 1863, Justice DANIEL P. INGRAHAM delivering the opinion of the Court. Reported in 39 Barbour, 140.*]

An agreement was made between the Pacific Mail Steamship Company and the Accessory Transit Company, by which the former company was to pay to the latter a certain sum per trip or per month, so long as the boats of the Pacific Company should run without opposition. *Held*, that in an action brought by the Transit Company against the Pacific Company, although the contract was immoral and in restraint of trade and commerce, the Court would not enforce it against the delinquent party, or, if the money had been paid, enable the party paying to recover it back, but would leave the parties as the law found them, both being *in pari delicto*. Yet, that the rule

did not apply to an action by one of the principals in such a contract against its agent who had received money thereon.

Money having been paid voluntarily to an agent for his principal, by a party who could not have been compelled to make such payment, it becomes the property of the principal in the agent's hands, for which the agent should account. He has no right to refuse payment to his principal, because the latter had not a legal claim to the money paid.

An agent has no right to dispute the title of his principal to moneys received by him for the use of the principal. Nor can he resist an action for the amount so received, on the ground that the money was paid on an illegal contract between the original parties.

After a corporation has virtually ceased to exist, and for all purposes of business and for promoting the objects of the charter, all its powers have been taken away, its property all expended, and the company is hopelessly insolvent, it is not improper for the president of the company to enter into arrangements on his own behalf for carrying on and continuing for his own benefit the business formerly conducted by the company under an agreement not imposing any duty or obligation upon the corporation, or involving any use of its property.

The being president of an insolvent corporation will not prevent one from doing what the corporation has lost all ability to do. After the company has virtually ceased to exist, and its powers have been taken away, the reason and policy of the rule prohibiting a trustee from making agreements for his own benefit ceases also. Where the president of a corporation, holding a mortgage upon vessels of the corporation, given to secure him for advances made, and for bonds of the company held by him, and authorized by the company to sell the vessels, as its agent, sold the same at private sale to his son, taking his note for the purchase money, payable in a year, he still keeping the control and management of the vessels and rendering no account to the purchaser for the use of them; *held*, that such a transaction could not be upheld, and the sale was ordered to be set aside, and the agent directed to account to the company for the proceeds of the vessels, when subsequently sold by him.

A. J. Parker, Henry A. Cram, and John Sherwood, for the plaintiff. H. F. Clark, C. O'Connor, David Lord, and Chas. A. Rapallo, for defendant.

INGRAHAM, J. This action is brought by the plaintiff, as receiver, appointed in various actions against the Accessary Transit Company for the collection of debts due from the company. [Points of practice, and other matters, aside from the trust sought to be charged upon the defendant in this case, are omitted. The principal point under immediate consideration arose under the agreement between the two steamship companies by which the Pacific was to pay the Transit Company, \$10,000 per trip, while the former had no opposition on their line of steam-

ships. The claim of the receiver, arising thereunder, that the defendant was chargeable as trustee, and could not make a contract for his individual benefit while an officer of the Transit Company, together with the testimony bearing thereon, will be understood in what follows of the opinion of the Court.]

An objection is taken to this claim, on the ground that the contract was immoral and could not be enforced; that, being in restraint of trade and commerce, the Court should not sustain it, but should leave the parties as the law found them, both being *in pari delicto*. That this rule would apply if the action was brought by the plaintiff or by Vanderbilt against the Pacific Mail Steamship Company, I have no doubt. The law would not enforce such a contract against the delinquent party, or, if the money had been paid, the law would not enable the party paying to recover it back, but would leave them as they placed themselves in carrying out the agreement, viz., to act upon it as a mere honorary arrangement among themselves with which the law could have nothing to do. But does such a rule apply to a principal and his agent who has received money for his principal on such an agreement? The money has been paid to an agent for his principal by a party who could not have been compelled to make such payment. But having been paid voluntarily, it becomes the property of the principal in the agent's hands, for which he should account; he has no right to refuse payment to his principal because his principal had not a legal claim for the money on the agreement. So far as there was a contract between the Transit Company and the defendant, the contract was legal; he was to receive moneys for them and pay over to the company. An agent has no right to dispute the title of his principal to moneys received by him for the principal's use. Nor has he a right to resist an action for the amount so received, on the ground that the money was paid on an illegal contract between the original parties. This was so held in *Tenant v. Elliot*, 1 B. and P. 3, and in *Farmer v. Russell*, 1 Id. 296-298. EYRE, C. J., says: "The plaintiff's demand arises simply out of the circumstance of money being put into the defendant's hands to be delivered to the plaintiff. This creates an *indebitatus* from which an *assumpsit* in law arises and on that an action on the case may be maintained." And again: "The

case is brought to this, that the money has got into the hands of a person who was not a party to the contract, who has no pretense to retain it, and to whom the law could not give it by rescinding the contract." BULLER, J., also says: "When it appeared that the agent had received the money to the plaintiff's use, it was immaterial whether the money was paid on a legal or illegal contract." Citing *Faikney v. Reynous*, Burr, 2069; *Alienbrook v. Hall*, 2 Wilson, 309. So where a confidential relation of principal and agent exists in regard to a trust for the benefit of the principal, the agent can not object that the trust is void, *Jenkins v. Eldridge*, 3 Story, 182. I know of no rule which will enable an agent for such a cause to retain in his hands moneys received by him from a third person for his principal.

After the making of the original contract or agreement with the Pacific Mail Steamship Company, payments were regularly made till about 11th of June, 1856; and some payments for trips on the other side were made afterward. About that date, the Pacific Mail Steamship Company refused to pay on account of the running of an opposition line from New York, by Morgan and Garrison. Previous to this date, the act of the Rivas-Walker government, in taking away the charter, had gone into effect. Under it the property of the Transit Company, which was in Central America, had been taken possession of by agents appointed by that Government. The defendant had made exertions, both at Washington and Central America, to obtain a restoration to the company of its rights and property. These efforts had proved fruitless. The route had passed from the Transit Company into the control of Morgan and Garrison, on or before the month of April, 1856. All the steamships of the company not seized by the Rivas-Walker Government, had been pledged to the defendant for advances and other moneys due him, and the possession of such ships was by resolution given to him on 12th June, 1856. The affairs of the Transit Company had become involved; their debts had accumulated; their means were all expended, and their vessels were all pledged and mortgaged for large amounts. The hope of a restoration of the charter and privileges of the company by the Government of Nicaragua had vanished, and the state of the company was such as to render it

almost impossible for them to run a line of steamers with the means which they possessed; and even if such a line could have been started, the vessels would have been seized on their arrival, and the passengers could not have been transported across the isthmus in opposition to the will of the existing Government. The Government of the United States had also recognized the Rivas-Walker Government in May preceding, and thereby had given validity in this country to the act repealing the charter of the company. It was under this state of affairs that the first agreement between the defendant and the officers of the Pacific Steamship Company was terminated, by the starting of the opposition of Morgan & Garrison, and the notice from the president of the Pacific Steamship Company, that they would make no further payments, in consequence thereof. At that time, the agent informed the president, he could stop when he pleased, and he, the agent, was ready to take care of himself, and that he would run a line on his own account. In consequence of this threat on the part of the defendant, a further negotiation took place, by which the Pacific Steamship Company agreed to pay for each trip when no opposition was run, and the defendant undertook, on his part, to get rid of the opposition of Morgan & Garrison. This involved large expenditures on the part of the defendant, in providing vessels and running opposition lines against Morgan & Garrison in the Gulf. Such expenditures were necessarily made by the defendant, because the Transit Company had neither the means nor the credit then to carry on such an enterprise. Without any further detail of the facts proved in regard to this branch of the case, there can be but little doubt that the defendant, at this time, was acting on his own behalf, and not for the company. That he, considering the condition of the company hopeless, would have undertaken the expenditures of large sums of money to break down the opposition of Morgan & Garrison, without any prospect of repayment to himself, is hardly to be presumed; and my conclusion is, that this second agreement for a subsidy, made about July, 1856, was made on his own account, and not for the company, and was not intended by him or the parties with whom it was made, to be for any other purpose than the individual interest of the defendant.

The subsequent agreements made in June, 1857, and in July,

1858, were of course, of the same character, and intended for the individual benefit of the defendant, and not for the use of the company. The means, condition, and prospects of the company having at those times become in a much worse condition than previously, and any prospect that might have been before entertained of its restoration having utterly failed, the defendant had been authorized by a resolution of the board, to sell all the steamers of the company, for the purpose of paying their indebtedness. The question then arises, whether the defendant bore such a relation to the Transit Company at this time, as prevented him from making this agreement for his own benefit, and whether any rule of law exists by which he can be compelled to account to the company for the moneys received by him under this agreement. The defendant had been the agent of the Transit Company previous to the 1st of June, 1856, under a resolution passed 3d January, 1856. This agency, by the resolution and by the agreement between the defendant and the company, terminated at that time, and there is no evidence to show its renewal. He had become a large creditor of the company by advances, and had liens on all the vessels of the company as security for part of such advances, and for bonds issued by the company which he owned. The relation he bore to the company was that of president and a creditor; and the question is, whether there was existing, as between him and the company, the relation of trustee and *cestui que trust*, which rendered it improper for him to make such an agreement for his own use. I do not deem it necessary to discuss the question whether the defendant, being president of a company, having the means and the power and authority to run steamers on such a route, could make a contract to lay up such steamers and take to himself a compensation for so doing. I think it must be conceded that he could not, and that such a contract would be for the benefit of the company, and not of the president. But when the company had virtually, ceased to exist; when, at any rate, for all purposes of business, and for promoting the object of the charter, as originally granted, all its powers had been taken away, its property all expended, and the company hopelessly insolvent, I have not been able to adopt the conclusion, that any such rule can be applied, more especially as the agreement imposed no duty or restraint on the company.

The vast number of cases to which the counsel of the plaintiff has referred, are cases where the agent or trustee has taken to his own benefit the property of the *cestui que trust*, or has done some act which the *cestui que trust*, through him, could have done for his benefit and advantage, or has used the property of the *cestui que trust* for purposes resulting in benefit to himself, which might have resulted in like benefit to the person for whom he was acting. This is not the present case. The property of the company was not used; the company could not, in any way, run a line to the isthmus. The company, in fact, had no existence for such a purpose, and the rule in regard to a misapplication of the property or rights of the *cestui que trust* can not apply to the case. In addition to this, the agreement imposed no duty or obligation on the company, nor was it put under any restraint thereby. The company could have run a line the next day if it had the power and means, as fully as it could the day before the agreement was made. In order to apply this rule to the present case, we must extend it so far as to say that the defendant was prevented by his relations to the company from running any steamers to the Isthmus while that relation to the company existed, and that even after the company had lost the ability to provide vessels and run them on the account of the company.

I do not understand the relation of principal and agent, or of trustee and *cestui que trust*, involving any such obligation. The law protects the party against the agent or trustee in the use of its property and rights, but not beyond them, and does not prevent the performance of acts which could not result in damage to the principal, or which could not conflict with the interests of the company. The being president of an insolvent corporation can not prevent him from doing what that company had lost all ability to do, even if its existence continued. Where the company has virtually ceased to exist, and its powers have been taken away, I think the reason and policy of the rule ceases also—because no duty rested upon the agent to run the line for the company, after the authority and ability of the company to do so had terminated. The case of *Abbott v. American Hard Rubber Company*, 33 Barbour, 578, and the *Cumberland Coal Company v. Sherman*, 30 Id. 553, were cases involving the

sale of the property of the corporation; but even that rule is modified in the case of an officer who is also a creditor, and acts for his own protection, *Smith v. Lansing*, 22 New York, 526 (a). It may well be doubted whether the terms of this agreement were at all within the bounds of the agency. The object of the charter of the company was to run vessels to the Isthmus and back, not to make money by agreeing not to run. The duties of the president were only in furtherance of the objects of the charter. An agreement on his part not to run a line himself, would have been to the benefit, not the injury, of the company, if they had the means and power to continue their own line. The agreement on his part not to run was no violation of those duties, and no interference with, or violation of, the rights of the company. They were not affected by it. They had no restraint upon them by which they were prevented from running the line, if they were able to do so. If it had been shown that in consequence of this agreement the defendant prevented the steamers of the company from running, another claim might have, per-

(a) In *Smith, receiver, etc., v. Lansing*, 22 New York, 520, it was held that the financial officer of a bank is not disqualified from purchasing for his own benefit property pledged to it for a debt. He discharges his duty when he sees to it that the sale is for a price sufficient to discharge the lien, and does not stand as a trustee for any profit he may obtain by buying at that price. That the general manager of a bank may make arrangements to secure himself and others, who, at his request, have become its sureties for moneys deposited. And such security not having been given when the liability was assumed, the general manager may use the funds and property of the bank to indemnify the sureties at any time when the bank is solvent, and not contemplating insolvency. Accordingly, where such a manager purchased in his own name real estate mortgaged to the bank, using its funds to pay his bid, and intending to hold the property for the security of himself and his co-sureties, and the bank afterward became insolvent, *held*, that the receiver could not compel a conveyance without indemnifying the sureties.

This ruling, however, appears to have been made with a qualification, for two of the judges protested "against any implication that the financial officer of a moneyed corporation is at liberty to speculate upon real estate bought by him under execution or the foreclosure of a mortgage in its favor." The reasoning of the court appears to sustain the text of the case, in allowing an officer of a corporation to take advantage of his position and knowledge to protect or speculate for himself, to the injury of the general creditor.

The late case of *Drury v. Cross*, a decision by the Supreme Court of the United States, 7 Wallace, 302 (and which is reproduced hereinafter), is in direct contravention to the latitude that seems to have been allowed in the Vanderbilt case, as well as in that of *Smith v. Lansing*.

haps, arisen out of that misfeasance. But there is no ground for that charge. On the contrary, as has before been remarked, the company were utterly without means to run the line, and so unable to pay the claims against them, that they had on June 2, 1856, obtained the consent of the defendant to purchase some of the vessels advertised to be sold to pay Morgan & Hoyt, and on the 12th of June had placed the possession of all their steamers with the defendant as security, and on the 2d of August had mortgaged to him all their coal, coal-hulks, etc., on the Pacific, as security for advances, and gave him possession thereof; and in November, 1856, they authorized the defendant to sell all of the steamers of the company, and apply the proceeds to the payment of their debts. I think there can be no doubt that, after the 12th of June, the company was unable to carry on its business; that its powers had ceased, and that the agreement afterward made by Vanderbilt with the Pacific Steamship Company in no way infringed the rights or interfered with the interests of the Transit Company, and in no way violated the duty he owed to that company as the president thereof. I conclude, therefore, that he is not liable to account to the receiver for any moneys received by him from the Pacific Mail Steamship Company on account of the subsidy under the agreements made by him after the 12th of June, 1856 (a).

(a) This case can not be received as an unquestioned authority. The facts therein clearly show, that Vanderbilt, by virtue of his office as president of the Transit Company, became fully informed of the affairs of his company; and embarrassed though it was, it was still his duty to give it the benefit of all his ability and experience. As the difficulties of the company increased, the more binding became his duty to give to it all his abilities and experience in the management of its business. True, he was not bound by such duty to become surety or advance to his company moneys; but having done so, he put himself in the position of other creditors, and his being an officer of the company did not justify him, as such, in appropriating to himself advantages not open to or shared in by other creditors of the company, *Drury v. Cross*, 7 Wallace, 302. Notwithstanding this, it is found he makes a sham sale of the company's property to his son, thereby getting the control of its means to bring the rival company to terms, and enable himself to profit by a contract, which, at best, was but a *renewal* of one that he had formerly made for his own company. Herein it is parallel with the case of the *Aberdeen Railway Company v. Blaikie*, preceding, wherein it was sought to give a contract entered into under circumstances similar to this, effect as a new and independent contract; but the court held it to be a mere renewal of the old one. Again, the case assimilates to that of a ward arriving at full age, and dealing

The plaintiff also claims an accounting for the steamships sold by the defendant for the account of the company. These vessels were all mortgaged to the defendant for advances made by him to the company, and for bonds held by him against the company, the validity of which is not denied. His authority to sell, therefore, can not be disputed. All the vessels sold, excepting the *Brother Jonathan*, were accounted for to the company long before the appointment of the receiver. These accounts appear to have been acquiesced in by the company. In the accounts thus rendered nothing is said of the *Brother Jonathan*. Lea, in his testimony, says that no account was ever furnished, and no evidence is given to the contrary. For the proceeds of this vessel the defendant is bound to account.

There is nothing in the evidence which would warrant the opening of the other accounts for the sale of the steamers, except that relating to the sale to William H. Vanderbilt.

with his guardian. The latter is not bound by a contract entered into with the former, which gives the guardian profits or advantages at the expense of the ward, unless afterward affirmed under circumstances showing the removal of all restraint and influence, and made with full knowledge, *Wright v. Arnold*, 14 B. Monroe, 646; *Clay v. Clay*, 3 Metcalf, 552; and numerous similar authorities. The receiver bringing suit, is a disaffirmance of Vanderbilt's contracting for himself.

Although insolvent, as is stated by the court, the company still had a legal existence, and at the time of the renewal of the contract Vanderbilt was the president, and consequently the trustee for the Transit Company. Within the technical rule, why does not the maxim apply, that although fraud could not be proved, under the circumstances it would be implied? From his condition as agent and manager of the company, he could easily cover up any evidence of fraud. The entire facts of Vanderbilt's dealing with the Transit Company should be considered together, to give character to the true equitable import of the renewed contract of June 12, 1856, and not that part isolated from the rest.

All taken together, it is apparent that this decision is one of the many that have recently brought at least a part of the judiciary of New York into disrepute. This loosening of the strict rules governing the fiduciary relation has just driven one judge from the bench; and if the association of attorneys in New York city is to be credited, others should, and may be, compelled to follow the example. As yet, no similar complaint, outside of New York, has been sufficiently authenticated to lead to similar results. At a time when the legislative bodies of the country are violating their duties as trustees for the community at large, THE JUDICIARY IS THE ONLY SAFEGUARD! It should be above even suspicion. And in regard to Judge INGRAHAM's decision in this case, it is intended to say only, that the strict rule governing the relations of trustees has been unwisely, injudiciously, and inequitably relaxed.

The other vessels appear to have been fairly sold, at a price not below their value in the condition and under the circumstance in which they were sold; and the proceeds of the sale have been accounted for to the company, and such account acquiesced in.

As to the sale of the steamers *Pacific*, *Cortes*, and *Uncle Sam*, to William H. Vanderbilt, I do not think it was such a sale as can, under the circumstances and relations of the parties, be sustained. The purchaser was his son, totally unacquainted with their value, having no occasion for the purchase. He paid no money therefor, but gave his note to the defendant, payable in a year. The defendant paid all expenses, and kept the control and management of the vessels. William does not appear to have been interested in the accounts or management of the vessels, but left all in the charge of the defendant. The defendant ran the vessels in an opposition line on the Pacific. He does not appear to have accounted or allowed for the use of them. He says he has not paid William any thing on account of them since the sale. No account has ever been rendered of these vessels by the defendant to William, nor has it ever been shown that any account between William and the defendant exists in regard to them. The negotiations for the supposed sale, also, were such as to throw great doubt on the *bona fides* of the transaction. Under all the facts in evidence, I can not avoid the conclusion, that this purchase was rather an arrangement to get the title out of the company into the defendant. Such a transaction can not be upheld. If the defendant had put up the property for sale, and had purchased the same in his own name, it might have been held to be good, because he had a lien upon it which he had a right to protect by purchase; but, in such a case, the sale should have been an open one, with an opportunity to others to compete with him for the purchase. Irrespective of his having a lien on the vessels by way of mortgage, he could not even have been a purchaser at such a sale, because the purchase would have been incompatible with his position as agent to sell. This sale must be set aside, and the agent must account for the proceeds of these vessels, as sold by him afterward. He will be entitled to credit for all the moneys due him thereon under the mortgages, and also for all money expended

for repairs prior to the sale by him. The appraisement of the *Daniel Webster*, and the appropriation by the defendant of that vessel to his own use, at the appraised value, can hardly be considered within the powers conferred upon him by the resolution authorizing the sale. Had such appraisement been submitted to the company, and their assent by resolution obtained, the case would be a different one. But the company was no party to the transaction. They had nothing to do with the selection of appraisers, nor were they consulted by the defendant as to the appropriation and use of the steamer by himself. The bill of sale, purporting to have been executed by the Transit Company to the defendant, for the *Daniel Webster*, dated the 18th November, 1856, is not entitled to consideration in connection with this branch of the case, because there was no warrant for any such bill of sale in the proceedings of the company, and no resolution appears on the minutes of the company, at any time authorizing such a sale to the defendant. The same remark may be made as to various other papers executed by Lea, as secretary, for which no authority can be found in the minutes of the company, and which Lea, as secretary, had no authority, without such action of the board, to execute. Among them are the contract with William H. Vanderbilt, bills of sale to him of the steamers and of coal, and bill of sale of William H. Vanderbilt's note to the defendant. All these papers appear to have been executed without any other authority from the company than that of the resolution of the 13th November, 1856, and can not be relied on as ratifying any contract between the defendant and William as to the contracts therein stated.

The sale of the coal, hulks, etc., on the Pacific, to William H. Vanderbilt, is subject to the same objections, and the same rule must be applied as that in regard to the steamers, and the same accounting therefor is ordered.

GARDNER v. OGDEN, *et al.*

[*This case was decided at the December Term, 1860, of the Court of Appeals of the State of New York; Judge HENRY E. DAVIES delivering the opinion of the Court. Reported in 22 New York, 327.*]

The Supreme Court has jurisdiction to compel the conveyance, by a defendant who has appeared in the suit, of land in a foreign state.

The clerk of a broker employed to make sale of land, who has access to the correspondence between his principal and the vendor, stands in such a relation of confidence to the latter, that if he becomes the purchaser, he is chargeable as trustee for the vendor, and must reconvey or account for the value of the land.

The vendor can not, it seems, unite in the same action a claim against the broker for damages for having fraudulently sold the land, with a claim against the purchaser for a reconveyance or accounting.

The clerk, in this case, held to reconvey so much of the land as remained in his hands, and to account for the proceeds of what he had sold, although the price paid by him upon the purchase was fair and adequate, and the broker was exonerated from fraud in the sale.

APPEAL from the Supreme Court. Action to avoid a deed as fraudulently obtained from the plaintiff, and to compel the defendant Smith to reconvey to the plaintiff the real estate therein described, or, as an alternative, that Smith and his co-defendant, Ogden, should pay the value of the land. Upon the trial before Mr. Justice GOULD, the following facts were proved:

In and prior to the year 1853, the plaintiff, a resident of Troy, in this state, was the owner of sixteen lots of land in the city of Chicago, in the state of Illinois. He had, as early as the year 1851, employed the firm of Ogden, Jones & Co., residing and doing business in the latter city, as his agents, to make sale of the lots, whenever practicable, and in the meanwhile, to look after them and pay the taxes thereon. The firm was composed of the defendant William B. Ogden, and Mahon D. Ogden and Edwin H. Sheldon. During the years 1852, 1853, and up to July 12, 1854, the defendant Smith and one Franklin Hathaway were clerks of said firm. On the 9th of March, 1852, the firm of Ogden, Jones & Co., addressed to the plaintiff a letter, in which they state, that Mr. Ogden had valued the plaintiff's lots at \$5,560, and that it was the highest valuation which the

lots would bear. It was also stated in this letter, that by forcing the lots on the market, a discount of from twenty-five to thirty per cent would have to be submitted to on this valuation. It was added: "We are of opinion, that the coming season will be a favorable one for bringing a portion of this property into market, and making sales at good prices." Ogden, Jones & Co., under the date of April 8, 1852, addressed a letter to the plaintiff, which was written by Hathaway and signed by him for the firm, in which they said: "As soon as the block can be resurveyed and subdivided, we shall be ready to sell. If applications are made for any of your lots, we will at once apprise you as you desire." On the 24th of June, 1853, the plaintiff again wrote to Ogden, Jones & Co., in which letter he said, that from what he heard of sales of other lots, his were worth \$1,000 a lot, or, in the aggregate, \$16,000. He wished his sold as near that sum as possible, one-third cash and the balance on interest at two, three, or five years. If the offer did not come up to \$700, he wished to be advised before concluding the sale. He desired his lots sold as soon as possible, as he wished to close up his distant matters; that he had fixed the minimum at \$500 a lot, but had learned it was too low a figure. He added: "I wish your opinion as to price and terms on which you can sell my lots, and whether you advise the sale at such prices." Under date of June 30, 1853, Ogden, Jones & Co. acknowledged the receipt of the plaintiff's letter of June 24th, and said he was not likely to get \$700 each for his lots; that they thought \$500 each a fair price on retailing them; that possibly \$600 might be got for some of them, and possibly \$700 might be obtained for some; that they would make every effort to sell for \$700, and would advise of progress. Under date of July 4th, the plaintiff wrote them that he thought he had better hold on to his lots, than sell them at retail for \$500; that if within the year 1853 they would bring \$9,000 or more, he would sell on the terms he had before proposed. After January 1, 1854, he would consider of new terms of sale, as he thought the property must advance. On the 6th of October, 1853, the plaintiff wrote Ogden, Jones & Co., that he could sell his lots for a fine \$8,000 house in Troy; that if they could sell them for \$500 each, or within \$500 of it, on notes payable in Troy, Albany, or New York, at

three, six, nine, and twelve months, he authorized them to do so, on those terms. He added: "As I may not exchange, and prefer to sell outright, please to see what you can do by October 25th." On the 26th of October, 1853, the receipt of this letter was acknowledged by Ogden, Jones & Co., in a letter to the plaintiff. It was written by Hathaway, their clerk, in their name. In it they said: "We have now to report an offer made by Mr. Henry Smith for your lots, as follows: He proposes to give you \$7,500, payable at the end of five or six years. If this offer is accepted, we will at once prepare the necessary papers, and see that security is ample." They added: "We doubt whether a better offer than this can now be obtained, as it is larger than the price paid for Mr. Hearlt's block three in same addition. An early answer is desired." The plaintiff answered this letter, as it is to be inferred, during the same month of October, as his letter commenced, "Yours of the 26th inst. is received." In it he said: "The sale will do. I sell as I am far off, and give the buyer a good bargain." On the 1st of December, 1853, the plaintiff again wrote to Ogden, Jones & Co., inclosing a deed for the premises, and requesting the securities to be forwarded to him. He again wrote to them on the 11th of January, 1854, not hearing from them in reply to his letter of December 1st, and requested their immediate attention to the matter. On the 13th of January, 1854, Hathaway, as cashier of Ogden, Jones & Co., acknowledged the receipt of these letters, and stated that a contract of sale, pursuant to the plaintiff's letter of November 12th, had been executed by Mr. Sheldon on his part, and by Smith, the purchaser, and that, owing to Smith's absence, they had been unable to get the mortgage executed; that it would be done as soon as Smith returned, and the papers would be sent to the plaintiff. On the 13th of February, 1854, Hathaway again wrote to the plaintiff that Smith was still absent in New York, and that when he returned the mortgage would be executed. On the 10th of April, 1854, the plaintiff again wrote to Ogden, Jones & Co., requesting the bond and mortgage to be sent, and on the 26th of May he again wrote to them, stating that he was in receipt of their letter of May 22, 1854, inclosing a note for \$7,500, and the mortgage. In this letter he said, that a reference to the deed he had sent

settled the question that the purchaser of the lots made certain taxes thereon the debt of Mr. Smith and Mr. Hathaway, "who now, by the note and mortgage, received by me yesterday, appear to be joint purchasers of my lots in Mr. Smith's name." On the 12th of June, 1854, the plaintiff advised Ogden, Jones & Co. of his dissatisfaction with the sale to Smith and Hathaway, and advised them, also, of his dissent thereto. The precise time when the mortgage by Smith and wife, and the note of Smith and Hathaway to the plaintiff were given, did not appear. As they were promised frequently to be sent to the plaintiff as soon as executed, and were sent to him in a letter, under date of May 22, 1854, it is inferable they were executed about that date. On the 24th and 25th of March, 1854, Smith, by M. D. Ogden as his attorney, sold portions of the lots purchased of the plaintiff for the sum of \$8,250; and on the 3rd of May, 1854, Hathaway, as Smith's agent, sold another portion thereof for the sum of \$1,000. The portions so sold were nine lots of the sixteen originally held by the plaintiff. This action was commenced against the defendants, Ogden & Smith, and in the complaint, the plaintiff prayed that said Smith might set forth whether he had sold said plaintiff's lots, when and to whom, and for what price, and that plaintiff might have judgment setting aside said deed to Henry Smith, and declaring said sale to said Smith to be void, and that he reconvey said sixteen lots to the plaintiff, unincumbered and with the same title that the plaintiff conveyed to him, or that said Smith and Ogden should pay to the plaintiff the highest value of the said sixteen lots, at the time of the commencement of this action, or at any time subsequent, and that they pay the costs of the action. On their compliance with such judgment, the plaintiff offered to surrender the mortgage and note received by him. The defendants answered, denying all fraud; and the defendant Smith, in his answer, admitted that he and Hathaway were clerks of Ogden, Jones & Co. during the year 1852, and up to July 12, 1854. Smith also set up in his answer, that after the sale and conveyance by the plaintiff to him, he had sold and conveyed, by contract for deeds, a part of said lots to divers persons in good faith, and that the legal possession and occupancy of a portion of said lots were, at the time of his answering, in persons other than himself, and that a portion of said lots had

been built upon and otherwise permanently improved by the purchasers thereof.

The judge at special term found the value of the lots, at the time of the trial (April 18, 1856,) to be \$15,000, and made a decree that the defendants, Ogden & Smith, should pay to the plaintiff that sum, with interest from that date, or, instead of paying that sum, Smith, if he should elect so to do, might reconvey to the plaintiff such portions of the said lots as he had not sold and conveyed, by a good title, free of incumbrance, and transfer and assign to said plaintiff, all the contracts made and entered into by him for the sale of any part of said lots, and pay over all sums of money which he, Smith, had received on such sales, with interest thereon from the time of such receipt; such conveyance and payment to be a satisfaction of said decree, so far as said damages and interest were concerned. And said defendants were also decreed to pay the plaintiff's costs. It was further provided in the judgment, that in case of such reconveyance, assignment, and payment, the plaintiff should accept the same in full of said \$15,000 and interest; and on payment thereof and compliance by the defendants with the decree, the plaintiff was directed to cancel the mortgage of the defendant Smith and wife, and deliver up to him his and Hathaway's note.

From this decree the defendants appealed. The court at general term, in the third district, reversed the judgment upon questions of fact, and ordered a new trial. The plaintiff appealed from that order to this Court, and stipulated, if the order should be affirmed, that judgment absolute might be entered against him.

William Curtis Noyes, for the appellant. *John H. Reynolds*, for the respondents.

[That part of the very able opinion of Judge DAVIES pertaining to the question of jurisdiction is omitted, as not directly connected with the subject of Trusts. His conclusions thereon are:]

DAVIES, J. These cases must be held to establish the jurisdiction of the Supreme Court, in the present case, on an impregnable basis, and that the court, having jurisdiction of the party

in whom the legal title to the land in controversy is vested, may, by its process of attachment and injunction, compel him to do justice by the execution of such conveyances and assurances as will affect the title to them in the state of Illinois.

It is appropriate here to examine into the nature and character of the complaint in this action, and the grounds upon which it is sought to make the respective defendants liable. The defendant Ogden is charged with a fraud in having made sale, by himself or his partners, of the plaintiff's lands, at a price far below their actual value, and when they knew that they were selling in an advancing market; that the firm, including Ogden, was interested in the purchase by Smith and Hathaway, their clerks, and that the sale was made to them to defraud the plaintiff; and the plaintiff claims to recover of Ogden the highest price which the land has attained, by reason of his fraudulent disposition of it. The plaintiff's ground of claim against Smith is, that he stood in such relation of confidence to the plaintiff that, in making the purchase, the law adjudges that he holds the subject-matter of it as the plaintiff's trustee, and that the plaintiff can call him to account as such. This the plaintiff can do, if such relation of confidence subsists, by requiring a reconveyance of the property, if that be practicable, with an account and payment of the rents and profits accruing during the time it was held by the trustee, or, if that is not practicable, by calling on the trustee to account and pay over to his *cestui que trust* all that he has realized, or ought by due diligence to have realized, from the trust estate. In the present case, the plaintiff has elected to regard Smith as his trustee; and his complaint as to him, and the decree of the special term, proceeds on this basis. The plaintiff, therefore, elects to affirm the sale made to Smith. He can not, *uno flatu*, affirm it as to him, and disaffirm it as to the defendant Ogden. It is difficult to see how, under the provisions of section 167 of the Code, these causes of action may be united in the same complaint. Although it may be said that both causes of action arise out of the same transaction—to wit, the sale of the plaintiff's lands to the defendant Smith—yet the cause of action against Ogden is for an injury to the plaintiff's property, while that against Smith is a claim against him as a trustee by operation of law. The

causes of action joined in this complaint do not affect both of the parties defendant. Ogden is not affected by, or in any way responsible for, Smith's acts as the plaintiff's trustee, and the complaint does not profess to make him liable therefor. So, Smith is not sought to be made responsible for the fraudulent acts of Ogden. On the plaintiff's own showing, he has separate and distinct causes of action against each of the defendants, and which can not be joined under the Code. The issues are separate; the relief prayed against each is distinct and different; and the proofs relied on to maintain each issue are of an entirely dissimilar character.

We have looked into the testimony in the case, to ascertain if the charge of fraud against the defendant Ogden is sustained by the testimony. As to any personal fraud, it is clear he was not guilty of any, for he was absent in Europe during all the time the negotiations of his firm with Smith, for the sale of the plaintiff's lands, were carried on, and did not return until about the time the complaint in this action was verified. The plaintiff entirely failed to show any fraud on the part of the firm or the defendant Ogden, of such a character as would make them responsible in damages for the sale of the lands to Smith. The testimony fully sustains the position that, at the time of the sale, the price paid, or agreed to be paid, was fair and adequate, and that the purchase-money was adequately secured; and it fails to show that Ogden's firm, or any member of it, had any interest in the purchase. The affirmance of the sale by the plaintiff is a complete answer to the claim for damages against the firm for fraud in making the sale. In the case of *Watts v. Massie*, 6 Cranch, 148, one Anderson, who made the survey which, it was alleged, Massie had located in his own name instead of that of his principal, was made a party defendant, charging him with fraud in making the survey. On the hearing, the complaint was dismissed, with costs, as to Anderson, and a decree made against Massie, which was affirmed by the Supreme Court on appeal. A proper disposition of this cause, as to the defendant Ogden, would have been to have dismissed the complaint as to him. The Supreme Court, at general term, having reversed the judgment of the special term and granted a new trial, and the plaintiff having appealed therefrom, and stipulated that, if it

should be affirmed, judgment absolute might be enacted against him, it is now proper to affirm that order as to the defendant Ogden, and render judgment absolute in his favor, by dismissing the complaint as to him, with costs.

It now only remains to consider the cause of action against the defendant Smith. It proceeds upon the ground that Smith stood in such relation of confidence to the plaintiff that the purchase made by him was made as the plaintiff's trustee, and that he can derive no benefit therefrom. This leads to an examination of the main and important question in the case. It is to be observed, in the commencement, that Ogden, Jones & Co. were the conceded agents of the plaintiff: as such, they owed a duty to him to manage and dispose of his property to the best advantage. It is admitted by the answer that Hathaway and the defendant Smith were clerks of the firm during the years 1852, 1853, and up to July 12, 1854. As such, they, of course, had access to the correspondence of the firm, were well acquainted with the plaintiff's urgency to sell, his motives for so doing, and all the facts and circumstances connected with the property known to the plaintiff's agents; and, as the clerks of the firm, they owed the same duty to the plaintiff. This view is much strengthened by the circumstance that all the correspondence with the plaintiff relating to the sale was carried on by Hathaway in the name of the firm; though, in the important letter of October 26, 1853, his name does not appear as the writer. It was written, apparently, by the firm, and signed in their name. A circumstance is disclosed in the proof, which tends strongly to the inference that Hathaway was either interested in this purchase from the beginning or intended so to be. I am strongly impressed with the conviction that he was originally a party in interest. It appears that the plaintiff and his sister, Mrs. Hall, were the owners jointly of block No. 1, Carpenter's addition, in Chicago, and of lots 4 and 5 in block 17; that the firm of Ogden, Jones & Co. had charge of this property, and, in the Spring of 1852, they made partition thereof between Mrs. Hall and the plaintiff, valuing each share at \$5,560. Hathaway, in the letter of January 13, 1854, informs the plaintiff that he had become the owner of Mrs. Hall's lots; and this circumstance presents a motive on his part to become the owner

of, or interested in, the share of the lots owned by the plaintiff. In addition to this, he became equally bound, with Smith, for the payment of the purchase money, and this, coupled with the conceded fact that he is now interested with him, leads to the inevitable conclusion that he was so originally, or, at least, intended to be. If Ogden, Jones & Co. had become the purchasers, instead of their clerks, Smith and Hathaway, what would have been the plaintiff's rights in the premises?

[The Court next proceed to a general examination of the law affecting trustees, most of which is a review and consideration of the leading authorities printed and referred to herein. To give this part of the opinion, would be, to a great extent, a repetition of what is stated in *Davoue v. Fanning*, preceding, page 1; *Aberdeen Railway Company v. Blaikie*, page 76; and the other cases therein referred to, and it is therefore omitted. The object of reprinting this case is, mainly, to show how far Smith, the defendant, clerk to the trustees or agents, is affected as a purchaser by reason of that relation; and that part of the opinion closes the case.]

It is undeniable, from these authorities, that if the purchase in this case had been made by the firm of Ogden, Jones & Co., it could not be sustained. Does the same principle apply to the purchase made by Smith, their clerk? It is not perceived upon what substantial ground a distinction can be drawn. Whatever duty his principals owed to the plaintiff, he equally owed the same. The rule, as we have seen, as laid down by Sugden, and which the authorities sustain, is, that the disability extends to all persons who, being employed or concerned in the affairs of another, acquired a knowledge of his property. Now, it is undeniable that Hathaway and Smith were employed or concerned in the affairs of the plaintiff relating to these lands, and acquired knowledge concerning them. The defendant Smith was the clerk, or assistant, of his principals. He was their agent, and employed in and about their business. Whatever disabilities they labored under, equally attached to him. It would work an entire abrogation of the rule to hold the principal subject to the operation of this rule, and exempt his clerks and agents from its effect. It would be opening the door to its evasion, so that it would lose all its vitality and virtue. The courts have not so

dealt with the application of this rule. It has been held that the partners in business of an assignee in bankruptcy are equally disqualified from purchasing as the assignee himself, *ex parte Barnett*, 7 Jurist, 116. It has been held to disqualify the solicitor to a commission in bankruptcy from becoming a purchaser at a sale of the bankrupt's effects, *Owen v. Foulkes*, 6 Vesey, 630, n.b.; *ex parte James*, 8 Id. 337; *ex parte Linwood*, and *ex parte Churchill*, before Lord ROSSLYN, cited 8 Id. 343; *ex parte Bennett*, 10 Id. 381. The precise point now under consideration arose before Vice-Chancellor SANDFORD in *Poillon v. Martin*, 1 Saund. Ch. 569, where he held that the clerk of an attorney was as much prohibited from purchasing from a client as the attorney himself; that the principle of the rule extended as well to him as to the attorney himself. I think this is the spirit of all the authorities, and that the honesty and fairness of transactions between principals and their agents demand a firm adherence to these rules, and to bring within their operation, not only the agent himself, but those in his immediate employ, and who are engaged in the transaction of his business, which is, necessarily, the business of the agent's principal. It can not be disguised that this sale was negotiated by one clerk with another clerk of the plaintiff's agents. All the mischiefs which the rules adverted to were designed to prevent, are apparent in this case. Assuming that it has been shown that the purchase made by Smith is obnoxious to the objections which have been urged, it follows that the plaintiff is entitled to a reconveyance of his lands. But as it appears that Smith, by his own act, in selling a portion of these lands, is incapable of doing that equity which the law commands, it follows that the plaintiff is entitled to the proceeds of such sales. The decree, or judgment, of the special term was, therefore, correct, in requiring him to reconvey to the plaintiff all such portions of the lands as remain unsold, and to account to him and pay over the proceeds of all those parts which have been sold. We see no objection which Smith can properly make to that part of the decree which gives to him the election to pay to the plaintiff the ascertained value of the plaintiff's lands in lieu of such reconveyance and accounting.

The order at the general term, granting a new trial, so far

as it relates to the defendant Smith, is reversed, and the judgment at the special term as to him affirmed with costs. And the order at the general term, granting a new trial as to the defendant Ogden, is affirmed, and, in pursuance of the plaintiff's stipulation, judgment absolute is rendered against him in favor of the defendant Ogden, by the dismissal of the complaint against him, with costs. ORDERED ACCORDINGLY.

All the judges concurring.

GOODIN v. THE CINCINNATI AND WHITEWATER CANAL
COMPANY, *et al.*

[This case was decided by the Supreme Court of the State of Ohio, at its December term, 1868, before Chief Justice LUTHER DAY, and JACOB BRINKERHOFF, JOSIAH SCOTT, JOHN WELCH, and WILLIAM WHITE, Judges, Judge WELCH delivering the unanimous opinion of the Court. Reported in 18 Ohio State Reports, 169.]

The owner of land who stands by, without objection, and sees a public railroad constructed over it, can not, after the road is completed, or large expenditures have been made thereon upon the faith of his apparent acquiescence, reclaim the land, or enjoin its use by the railroad company. In such case there can only remain to the owner a right of compensation.

As a general rule, the property of a corporation is a trust fund for the benefit of its creditors and stockholders, and they may, in all cases where it has been fraudulently or wrongfully disposed of by the directors, pursue it into the hands of purchasers with notice, and assert their lien upon it, or their claims for its value.

A railroad company, having purchased a majority of the shares of stock in a canal company, elected for the latter a board of directors who were in the interest of the railroad company, and then, with the assent of said board, appropriated the entire canal and property of the canal company as a railroad track, paying therefor a price or compensation which was agreed upon by the directors of the two companies, but which was far below the actual value of the property. *Held*, that although the stockholders and creditors of the canal company can not, after the road has been completed, reclaim the property, or enjoin its use, yet they are not concluded by such agreement, so far as regards the price of the property, but may, by action, compel the railroad company to account for its additional value.

The rule of valuation in such cases is, what the interest of the canal company was worth, not for canal purposes merely, or for any other particular use, but what it was worth generally, for any and all uses for which it might be suitable.

ERROR to the Court of Common Pleas of Hamilton County. Reserved in the District Court.

The Cincinnati and Whitewater Canal Company was incorporated in 1837, under a local act of that date (55 O. L. 393), and soon thereafter constructed its canal from Cincinnati to the Indiana state line, near Harrison.

The Indianapolis and Cincinnati Railroad Company was subsequently chartered under the laws of Indiana, and constructed its road from Indianapolis to a point at or near the said western terminus of the canal.

Prior to 1862, the latter company used the Ohio and Mississippi Railroad for transportation of its cars from that point to Cincinnati. But in 1862, desiring to have an independent approach from Harrison to Cincinnati, the said Indianapolis and Cincinnati Railroad Company, by its officers and agents, took stock in and organized a new railroad company, under the laws of Ohio, by the name of the Cincinnati and Indiana Railroad Company. The object of this movement was to obtain control of the canal, and convert it into a railroad track. As means to this end, the two railroad companies, acting through their common president, Henry C. Lord, bought up, at nominal or very low rates, more than half the stock of the canal company, and with the power thus acquired, reorganized its board of directors, putting in place of the old directory members who were in the interest of the railroad companies, with Mr. Lord at their head as president, who thus became president of all three of the companies.

A formal proceeding was then had before the probate judge of Hamilton County, at the instance, or rather in the name, of the Cincinnati and Indiana Railroad Company, against the canal company, for the condemnation of the canal, its bed, embankments, fixtures, rights of way, grounds, etc., as a track, and for the uses of the new railroad company. In this proceeding, by agreement of parties—that is, by agreement of the two boards of directors thus constituted—a jury was dispensed with, the amount of compensation and damages fixed at fifty-five thousand dollars, and the property condemned to the use of the Cincinnati and Indiana Railroad Company.

At the time of this proceeding, the canal company was, as it

still is, largely in debt. It had executed for the security of its creditors three several mortgages upon its entire property. These mortgages were then in suit in the District Court of Hamilton County, at the instance of the mortgagees, in an action entitled *L'Hommedieu, et al, v. Cincinnati and Whitewater Canal Company*. In that action an interlocutory order had been made for the sale of the canal and appurtenances, and under this order the property had been appraised at \$55,000, the same amount so agreed upon by the parties to the condemnation proceeding. It seems the railroad companies, acting through Mr. Lord, their president, had also bought up, at nominal or very low prices, a controlling amount of the mortgage debts represented in the action, and thereupon had procured a stay of proceedings under the interlocutory order of sale, and an order of the district court placing said sum of \$55,000 in the hands of Mr. Lord, as *receiver* in the case, in lieu of the canal property so ordered to be sold. Mr. Lord, thereupon, as president of the Cincinnati and Indiana Railroad Company, drew his check upon the funds of the company in bank, for the \$55,000, and delivered the check to *himself*, as *receiver* in the case, for the benefit of the mortgage creditors; and thus paid to the canal company the amount of the condemnation money.

Immediately after these proceedings of condemnation, the Cincinnati and Indiana Railroad Company took possession of the canal, and proceeded to lay its road upon the banks and bed thereof, and to appropriate its entire way, basins, bridges, tunnels, aqueducts, and other fixtures, to the use of its railroad; and the canal was utterly abandoned and despoiled as such, the canal company from that time ceasing to exercise any control over the property.

In December, 1864, after the Cincinnati and Indiana Railroad Company had completed its road, with depots, machine-shops, turn-tables, and other necessary fixtures and appendages, at an aggregate cost of over a million of dollars, and after the same had been equipped, and put in running operation, and permanently leased to the Indianapolis and Cincinnati Railroad Company, the plaintiffs, James and Samuel Goodin, who are owners of some of the stock, as well as of part of the debts of the canal company, filed their original petition in this case, making the three corpora-

tions, as well as some of their individual officers, who took an active part in the proceedings complained of, parties defendant. The plaintiffs ask that the pretended sale, or condemnation of the canal property, may be set aside as a fraud upon the minority of the stockholders and creditors, who did not participate therein; that the railroad companies may be enjoined from further using the line and fixtures of the canal for railroad purposes; or, if neither of these remedies can be granted, then they ask that the two railroad companies may be adjudged to hold the property as trustees, and compelled to account for the full value of the same to the canal company, or to its stockholders and creditors; and for other relief.

On the hearing in the Common Pleas, the court held the proceedings of condemnation to be valid, and that the plaintiffs were not entitled to any relief, and their petition was accordingly dismissed. A bill of exceptions, taken by the plaintiffs on the hearing, sets forth all the evidence in the cause, and shows that a motion of the plaintiffs for a new trial, predicated upon the alleged ground, that the finding of the court was against the law and evidence, was overruled.

By the testimony set forth in the bill of exceptions, it appears that the canal property so condemned at the time of its appropriation, was of little if any more value, to be used *merely as a canal*, than the sum agreed upon, to wit, the sum of \$55,000; but that *for railroad purposes*, or for general purposes, it was worth a much larger sum. The witnesses, however, who put this high estimate upon the value of the property, do so upon the supposition or conviction, that the abandonment of the canal did not work a reversion of the property, or right of way, to the original proprietors, but that the same could lawfully be transferred by the canal company, or condemned in its hands for the uses of a railroad. The bill of exceptions also shows that testimony offered by the plaintiffs to prove the value of the property for railroad purposes, or for general purposes, and not merely for the uses of a canal, was refused by the court, and that the plaintiffs excepted to the order of refusal.

A petition in error to reverse the judgment of the Common Pleas was filed by the plaintiffs in the District Court, and has been reserved for decision here.

The assignments of error are, substantially, that the court erred :

1. In rejecting the testimony so offered by the plaintiffs.
2. In refusing a new trial.
3. In dismissing the plaintiffs' petition, and refusing the relief sought.

T. W. Bartley, for plaintiffs. *G. E. Pugh*, for defendants.

WELCH, J. The question mainly argued in this case is, whether by the laws of Ohio, and particularly under the twelfth section of the General Railroad Act (1 S. & C. 278), there is any power given by which a *canal* can be condemned and converted into a railroad against the will of the owners of the canal. We think the question does not necessarily arise in the case, and therefore leave it undetermined. It is a question which the plaintiffs are not in a position to raise. Where a party stands by, as we must presume the plaintiffs to have done in the present case, and silently sees a public railroad constructed upon his land, it is too late for him, after the road is completed, or large sums have been expended on the faith of his apparent acquiescence, to seek, by injunction or otherwise, to deny to the railroad company the right to use the property. Considerations of public policy, as well as recognized principles of justice between parties, require that we should hold, in such cases, that the *property* of the owner can not be reclaimed, and that there only remains to him a right of *compensation*. The injunction in the present case might have been sought at the first known attempt, or even threat, to despoil the canal, or to construct the railroad upon its line. The omission to do so is an implied assent. The work being completed, the public, as well as those directly interested in the road as stockholders and creditors, have a right to insist on the application of the rule that he who will not speak when he *should*, will not be allowed to speak when he *would*. So far, therefore, as regards the relief by way of injunction, or the right of the Cincinnati and Indiana Railroad Company to the continued use of the property, we deem it quite immaterial whether the proceedings of condemnation and appropriation are void or valid ; or if void, whether they are so for want of power in the railroad company to *condemn*, for want of power in the

canal company to *agree* upon the price, or for want of an assessment by a *jury*. It is enough to know that the appropriation has in fact been made, and that the plaintiffs have delayed their suit so long, and under such circumstances, that to grant the request now would work a great public injury, and be a virtual fraud upon the Cincinnati and Indiana Railroad Company.

The case is fairly within the principle settled in that of *Chapman & Harkness v. Railroad Companies*, 6 Ohio St. 136. It may well be said in the present case, as the court said in the case referred to: "Before a stockholder can be entitled to a remedy by injunction against such departure from the original objects of the incorporation, he must have shown himself prompt and vigilant in the assertion of his rights as such stockholder. It will not do for him to wait until the mischief of which he complains is accomplished, fortunes expended, and great public interests created. If he does, he must be held to have acquiesced in the change, or to content himself with some other form of remedy."

Precisely the same point was determined in *Kellogg v. Ely*, 15 Ohio St. 64, where the court say, when speaking of the plaintiff's right to an injunction: "Remaining inactive and silent until his swamp-lands were drained by a ditch of nearly a mile in length, he then, for the first time, asks the interposition of a court of equity. We think he comes too late" (a).

(a) In Ohio, the forms of actions are abolished, and all suits are brought by petition, without at all interfering with the principles governing suits at law or in equity. Consequently, in the suit of *Goodin v. The Whitewater Canal Company*, above, although in the nature of a suit in equity to establish a trust, the doctrines of estoppel, both in law and in equity, were applied to the case.

As the rules governing ESTOPPELS, or RATIFICATION, or ACQUIESCENCE, arise in almost every case involving the fiduciary relation, reference is here made (as has heretofore been done) to many cases bearing thereon, and extended extracts given at length from others.

ESTOPPEL IN LAW.—The Court, Judge SWAN delivering the opinion, in *M'Afferty v. Conover's Lessee*, 7 Ohio St. 105, thus defines estoppel: "A party will be concluded from denying his own acts or admissions, which were expressly designed to influence the conduct of another, and did so influence it, and when such denial will operate to the injury of the latter." "The declaration of the party sought to be estopped *in pais* must be *willful*." This is the rule first adopted in equity, and afterward followed in law.

The question of *compensation*, however, stands upon a very different basis. The railroad company, having acquired this property, ought to pay for it a *fair value*, unless, by an *agreement* between the parties, such as a court of equity will uphold, a less price has been fixed. Was \$55,000, then, a fair value for the property? And if not, did the parties, by a valid *agreement*, fix upon a less sum? These, it seems to us, are the only questions remaining in the case, and we are constrained to answer them both in the negative. We think the price was grossly inadequate, and that the agreement can not be sustained in a court of equity.

In the case of *Hatch v. The Cincinnati and Indiana Railroad*

"A party setting up estoppel must establish that he had been induced, by his faith in, or reliance upon, the assertion or acts of such party to the contrary, to do some act or incur some liability, which would make it injurious to, or a fraud upon, him, to allow such truth to be shown," *Garlinghouse v. Whitwell*, 51 Barbour, 208.

Estoppel *in pais* is never allowed to be used as an instrument of fraud, but only to prevent injustice, *Pierepont v. Barnard*, 5 Barbour, 364.

Copeland v. Copeland, 28 Maine (1848), 525: Introductory note in the case, which was an ejectment: "At law, as well as in equity, where one, by his words or conduct, willfully causes another to believe the existence of a certain state of things, and induces him to act upon that belief, so as to alter his own previous position, the former is concluded from averring, against the latter, a different state of things as existing at the same time." "But several things are essential to be made out at the same time; the first is, that the act or declaration of the person must be *willful*—that is, with knowledge of the facts upon which any right he may have must depend, or with an intention to deceive the other party; he must, at least it would seem, be aware that he is giving countenance to the alteration of the conduct of the other, whereby he will be injured if the representation is untrue; and the other must appear to have changed his position by reason of such inducement."

Tilghman v. West, 8 Iredell's N. C. R. in Eq. (1851), 184: Estoppel set up against plaintiffs on the ground that they were present at sale of slaves, and did not forbid it. The court say: "The silence is explained by their ignorance of the fact." "Fraud can not exist as a matter of fact when the intent to deceive does not exist."

Davidson v. Barclay, 36 Penn. R. 406: Barclay was in the army when Davidson, his lessor, sued for alleged rent due, and to forfeit right of purchase, not making Barclay defendant (as the laws of Pennsylvania prevented suit against soldiers, and Barclay was in the army), but tenant and his mother-in-law, a member of his family. Got possession and improved. Barclay returned home, and remained quiet for two years before suing. Previously, Davidson had expended \$4,000 in improvements, and during the two years after Barclay's return, \$2,700. *Held*, pp. 416-7, that no estoppel existed against Barclay—"silence estops only when it is fraud." That Barclay was not bound to pay the \$4,000 spent before

Company, decided at the present term of this Court, the railroad company claimed, and the Court held, that the appropriation of the canal to railroad purposes did not work a *reversion* of the property to the original proprietors. In other words, that the canal company had a perpetual easement in the property, which was *transferrable* to a railroad company, and of course were entitled to receive a full compensation therefor. The court below, in the present case, refused to hear evidence of value based upon that view of the law, but enough of evidence appears in the bill of exceptions, notwithstanding the refusal of the court, to show that the property was worth vastly more than \$55,000, the price paid. True, the evidence shows that the property was of little

his return, but was the \$2,700, on equitable principles; that he was asking equity and must do equity.

Commonwealth v. Moltz, 10 Penn. 530: An important case, in which the question, What in law constitutes an estoppel *in pais*? is fully examined, and many authorities cited. Some of the authorities show that *fraud* must exist—in others, that the silence must put the injured party in a different position. *Per curia*, p. 532: "In this particular, the defense, founded on estoppel, differs from a plea of the statute of limitations, which, by positive law, the mere lapse of time creates a flat bar, and it is, therefore, incumbent on the party who would take his case from under the operation of the act, to prove the exception. But he who avers an estoppel, either by pleading or evidence, must establish by proofs, positive or circumstantial, every fact that essentially enters into the character of such a reply to the plaintiff's suit. It is to be considered that the doctrine of estoppel is an exception to the general rule for the prevention of fraud, and is not to be extended beyond the reasons on which it is founded." Acquiescence by time was claimed in this case.

Todd v. Wheeler, 1 Dana, 401: In chancery to recover land. In 1819, by entry on consent of counsel, defendant waived right to set up statute of limitations, and plaintiff the right to remove the case to the Federal court (which he had not). In 1825 defendant moved to set aside this agreement. In 1827 defendant filed affidavits that the agreement of 1819 was made by attorney without consent of defendant, and on trial of merits, the agreement was set aside. Notwithstanding the court say defendant had knowledge of it immediately after the agreement of 1819, and the delay was unreasonable, still they were not estopped, because they had given a substantial defense for nothing.

EQUITABLE ESTOPPEL.—*Foster v. Shreve*, 6 Bush, 529: A late case, in which eight years' acquiescence was held to bind parties in which real estate was involved, and what constituted an "*equitable estoppel*," defined. Page 530, sec. 1542, of Story's Eq. Jurisprudence, is referred to and approved, in which the party is held, if "*he thereby induces others to do that which they might otherwise have abstained*" from doing, he can not afterward question the act, as where the interested party sees money paid and does not assert his right.

Mitchell v. Moore, 6 Bush, 661: The trustee purchased, having funds of *cestui* in his hands to pay for the land. The *cestui*, pending litigation, was trying to

value as a canal. As such, in the language of defendants' witnesses, it was "played out." It seems to have been as such that it was appraised, upon the interlocutory order of sale; and as such it must have been valued by the two boards of directors, at the time of its sale or *pro forma* condemnation. This was no fair method of estimating the value of the property. The true value of any thing is what it is worth, when applied to its natural and legitimate uses—its best and most valuable uses. The estimate should have been of its value *generally*—for any and all uses—and not for any particular, and especially not for any inferior or inappropriate use. It is in vain to say that the property is worth little to the canal company, because they have no power, as such,

withdraw them by legal proceedings. HARDIN, J.: "Whether or not paid over," the *cestui* "should be made to elect whether she will take the money or the land."

Martin v. Zellerback, 38 California, 300: It is alleged that the true ground is, that the party to be estopped "has misled another to his prejudice." To constitute an estoppel it must appear, 1. That the party must have known the true state of his own title; 2. That done to deceive, or with culpable negligence; 3. That the party affected had not the full knowledge; 4. That he relied upon such admissions.

Bankart v. Tennant, 10 Equity Cases, L. R. S. 145. Sir W. M. JAMES, V. Ch.: "Plaintiffs say they were in actual enjoyment of the water from 1849 to 1866; but it can not be said without question, because the very same question which is raised by this suit was, in fact, raised in the year 1852, when certain letters passed between the parties, in which, on one side, it was contended that there should be an actual grant of the said right to the water, and on the other side, the grant was refused. The question must be, in fact, considered to have been in abeyance and suspense from 1852 down to the present time, neither party being, in my judgment, either benefited or injured by any thing that has occurred since the year 1852. It must be tried, therefore, as if it was in that year." The principle upon which an estoppel is held is stated on page 146, citing Lord KINGS-*down*, in *Ramsden v. Dyson*, 1 H. L. 129: "If possession is taken with knowledge under circumstances that possessor has good reason to suppose he acquires an interest, and expends money, equity will sustain it," etc. In this case, the defendant was the owner of a canal of which the plaintiffs were large customers, and a united understanding was come to between the parties that, so long as the plaintiffs remained good customers of the canal, they should be allowed to use the superfluous water thereof for the purpose of copper-works, of which they were occupiers under an agreement for lease with the defendant. It was shown that the use of the water of the canal, though convenient and economical, was not absolutely essential to the plaintiffs' works. *Held*, that such an understanding did not form the foundation of an equitable right; otherwise, if the plaintiffs, with the knowledge of the defendant, had incurred expense in establishing a manufacture for which the use of the water was absolutely necessary.

As to ACQUIESCENCE, see note to *Oliver v. Piatt*, preceding, page 38; also note to *York and North Midland Railway Company v. Hudson*, preceding, page 72; also note to *Baker v. Whiting*, hereinafter.

to convert it into a railroad. The stockholders and creditors of the canal company could organize *themselves* into a railroad company, at any time, and thus realize the full value of the easement. But even if they could not, that is no good reason why their property should be taken from them at less than its real value. The railroad company should pay *somebody* for this property. She refuses to pay the original owners for it, because, she says, the canal company, by transferring it to her, prevented its relapse to such original owners; and she refuses to pay the canal company any thing more than a nominal price for it, because, she says, *if* the canal company had *not* transferred it to her, it *would* have relapsed; and as the result of this logic she gets the property for a merely nominal price. She gets it as a kind of waif, which, failing to find an owner, somehow falls into her hands, as the fortunate finder. The insolvency of the canal company is a poor reason to render for refusing to pay her a fair price for her property. If she is insolvent, she has the more need of a full price.

As to the *agreement*, by which the price or compensation was fixed at \$55,000, we have no hesitation in saying that it ought not to be allowed to stand, so as to affect the rights of those who gave no assent thereto. Without attempting to decide as to the power of directors, in the absence of authority given by the stockholders, to fix a price or compensation for the property so sought to be appropriated, it is enough to say that this is not such an agreement as equity will sustain. There was not only such a gross inadequacy of price as to shock the moral sense, but there was in effect, a sale by a trustee to himself, or to his own use and benefit. This equity will never permit, not even where there is good faith and an adequate consideration. Here there was neither. The vender and purchaser were in the same interest. As directors of the canal company, it was the *duty* of Mr. Lord and his associates to obtain the *highest* price for the property; while as stockholders of the railroad company, it was their *interest* to get it as *low* as possible. It was, in effect, a sale by the railroad company to itself. There was no adverse interest or adversary parties, and the sale was a mere form. Nothing is better settled in equity than that such a transaction on the part of a trustee does not bind the *cestui que trust*. It is equally well settled that the property of a corporation is a trust fund in

the hands of its directors for the benefit of its creditors and stockholders. 2 Story's Eq. 1252; *Aberdeen Railway Company v. Blaikie*, 1 M'Queen, 461; *Wood v. Dummer*, 3 Mason, 309. If it was desired or intended to make such a purchase of the property as would bind the stockholders and creditors of the canal company, *all* of them should have either been consulted or bought out. That would have been the fair way to accomplish the object. To undertake by getting control of the company, and then under pretense of acting as *agents and trustees for all* the stockholders and creditors, deliberately to trample under foot the rights of the minority, is rather a sharp practice, and one which a court of equity will never tolerate. A director whose personal interests are adverse to those of the corporation has no right to be or act as a director. As soon as he finds that he has personal interests which are in conflict with those of the company, he ought to resign. No matter if a majority of the stockholders, as well as himself, have personal interests in conflict with those of the company. He does not represent them as *persons*, or represent their *personal* interests. He represents them as *stockholders*, and their interests *as such*. He is trustee for the *company*, and whenever he acts against *its* interests—no matter how much he thereby benefits *foreign* interests of the individual stockholders, or how many of the individual stockholders act with him—he is guilty of a breach of trust, and a court of equity will set his acts aside at the instance of stockholders or creditors who are damaged thereby. Any act of the directory by which they intentionally diminish the value of the stock or property of the company is a breach of trust, for which any of the stockholders or creditors may justly complain, although all the other stockholders and creditors are benefited, in some other way, more than they are injured as such. While, therefore, we are of opinion that the court below was right in refusing the plaintiffs an injunction, in refusing to set the sale or appropriation aside, and in refusing to place the property in the hands of a receiver, we think the court erred in rejecting testimony as to the general value of the property, and in not finding and holding that the Cincinnati and Indiana Railroad Company was liable to account to the Canal Company for the full value of the property taken, less the said sum

of \$55,000 already paid, and in refusing to grant a new trial on that ground.

Judgment reversed, and cause remanded for a new trial and further proceedings.

DAY, C. J., BRINKERHOFF, SCOTT, and WHITE, J. J. concurred.

GEORGE BAKER AND WIFE v. WHITING, AND OTHERS.

[*This case was decided at the May Term, 1839, of the Circuit Court of the United States for the State of Maine, JOSEPH STORY, Associate Justice of the Supreme Court, and ARTHUR WARE, District Judge, Justice STORY delivering the opinion. Reported in 3 Sumner's Circuit Court Reports, 475.*]

A deed of release for a valuable consideration, and intended to convey all the party's right and title, if it can not take effect as a release, may be construed, in furtherance of the intention of the parties, as a bargain and sale, or other appropriate conveyance, *utres magis valeat quam pereat*.

The old cases with regard to maintenance and champerty go farther than would now be sustained in courts of equity. A *cestui que trust* may lawfully dispose of his trust estate, notwithstanding his title is contested by the trustee. Neither the common law, with regard to maintenance and champerty, nor the statute of 32 Henry VIII, ch. 9, made in aid thereof, apply to a trust estate actually existing, either by the acts of the parties, or by construction of law. There can be no disseisin of a trust, though the exercise of an adverse possession for a great length of time may in equity bar or extinguish it.

A purchase by an agent will be deemed, by a court of equity, a purchase for his principals, unless the agent has openly and notoriously, and with full notice to his principals, discharged himself from his agency.

A tenant in common can not, without the consent of his co-tenants, grant permits to persons to go on the premises owned in common, and to cut down timber thereon for their own use, for a compensation, called, in the language of the country, "stumpage."

All acts done by one tenant in common, are to be done for the interest of all the co-tenants, and in conformity to their rights, until an adverse claim is notoriously set up and established by competent proofs.

Stimpson gave a deed of release of his interest, as a tenant in common, in certain premises, to Baker. At the time of this conveyance, Whiting was in possession and seised of the premises, claiming them in his own right, by virtue of a purchase under a tax sale. Whiting was one of the tenants in common of the premises, and was the agent of Stimpson and the other proprietors. *Held*, that the purchase of Whiting must be deemed a trust for the benefit of Stimpson and his grantee, Baker, to the extent of their interests; that he ought to be decreed to convey the legal title to the premises

after being satisfied of all just claims, which he had against them for taxes, for the purchase money laid out in the tax sale, for his expenditures and improvements upon them, and also for his reasonable services as agent in the premises, deducting all sums of money received by him in the premises for "stumpage," or otherwise.

In equity, length of time is no bar to a trust clearly established; provided no circumstances exist to raise a presumption from lapse of time of an extinguishment of the trust, and no open denial or repudiation of the trust, is brought home to the knowledge of the parties in interest, which requires them to act as upon an adverse title.

BILL in equity and cross-bill. The bill stated, that on or about the 10th of November, 1800, John Peck, by deed of bargain and sale, conveyed to Jacob Tidd, father of Emily, the wife of George Baker, and to Samuel Stimpson seven thousand and twenty acres of land situate in township No. 12, now Whiting, in the county of Washington, whereby the said Tidd and Stimpson became seised of an absolute estate in the said seven thousand and twenty-three acres of land in fee simple, as tenants in common thereof, and in common with other owners of the said township. Afterward, Tidd and Stimpson employed the defendant Whiting as their agent, to take care of the said land and prevent any trespass thereon, and to pay all taxes lawfully assessed on the same, or give notice thereof to his constituents, which the said Whiting undertook to do. Jacob Tidd died in the year 1821, and thereupon one-seventh of his interest descended to his daughter Emily, who became seised thereof. Another undivided seventh part descended to her brother William Dawes Tidd, son of the said Jacob, who became seised thereof, and afterward died, so seised, unmarried and without issue, whereby one-sixth part of the said undivided share of the said W. D. Tidd, descended and came to the said Emily. Samuel Stimpson afterward conveyed all his interest to George Baker.

The bill charged a combination between Charles Peavy, Timothy Whiting, Jr., M. J. Talbot and Samuel A. Morse, and others, persons unknown, and that they entered into the said tract and disseised the complainants, under pretense that the said lands were legally assessed for public taxes and duly advertised and sold to the said Whiting, Sr., as the highest bidder, and that the said owners neglected to redeem the same according to the laws of Maine, whereby the said Whiting, Sr., lawfully became the

absolute owner thereof in fee simple ; whereas the contrary is true, and that no such tax was lawfully assessed, nor was any sale thereof lawfully made.

That Whiting fraudulently kept the complainants and the said Tidd and Stimpson, wholly ignorant and uninformed of the said pretended assessment and sale, that he might seem to acquire some legal title to the said seven thousand and twenty-three acres, through their neglect to redeem the same.

That the said Whiting, Sr., after his pretended purchase, sold the said lands, absolutely but not in good faith, and for a valuable consideration, to the said Morse, Talbot, and Whiting, Jr. ; or some of them. The said grantees petitioned for partition as tenants in common with persons unknown, and that, on notice given and proved, and proceedings had, partition was made by commissioners appointed for that purpose, and lands were set off in severalty to Morse, Talbot, and Whiting, Jr.

The bill alleged further, that Whiting, Sr., under some pretense of right, had cut down, converted to his own use, and received pay for large quantities of timber, without the license or consent of the complainants, or persons under whom they claim, and that during the past Winter, and up to the time of the filing of the bill, the said Peavy and others had entered upon the said lands and cut down a large number of timber-trees thereon, which they were about to remove and convert into lumber, to the great and irreparable injury of the complainants.

The bill concluded with a prayer, that the defendants might discover and exhibit any and all letters, agreements, memorandums, original deeds, and paper writings in their possession or control relating to the matter stated and charged ; that they might account for the value of the timber and trees, which were upon the said lands, and cut down by them or by Whiting, Sr. ; that they might be restrained from cutting and removing the said timber, and that they might be required to release their pretended titles to the premises, and for further and other relief.

The answer of Timothy Whiting admitted the title to have been originally in Emily Baker, as stated, but alleged, that it was defeated by a tax sale, on the 7th of August, 1821, and further denied all agency for the complainants, or for Tidd or Stimpson, or that he ever undertook to act as agent for them. The

answer stated, that the defendant, on the 27th of August, 1821, purchased seventeen thousand five hundred acres, lying in common with the residue of the said lands in the said plantation, at an auction sale of the same, by Enoch Hill, collector of taxes for that year, the same having been sold for the non-payment of certain taxes assessed on the said lands, being the unimproved lands of non-resident proprietors thereof for the year 1821, the said taxes amounting to \$357.85. The sale was advertised, previously in the *Eastern Argus*, printed at Portland, and in the East-port *Sentinel*, and notice thereof posted in the said plantation.

The said collector executed and delivered a deed of the said land to the defendant on the 6th of November, 1821, to hold in fee simple, but subject to the legal right of redemption; but which was never redeemed, and so the defendant became the absolute owner thereof in fee.

Whiting further alleged, that he owned several thousand acres in the town of Whiting, prior to August 27, 1821, but had no means of knowing the exact quantity, and that, therefore, it became necessary for him to convey to Whiting, Jr., Morse, and Talbot, in order to have his interest properly ascertained, and set off in severalty; that many years prior to the filing of the bill, Whiting, Jr., Morse, and Talbot, had conveyed their said several parcels to the defendant, whereby the legal title became vested in him, and during the past Winter, and to the time of the filing the bill, he entered upon lands owned by him in severalty, and no other, and cut down a large number of timber-trees as charged in the said bill, as he had a right to do.

Whiting further alleged, that the deed mentioned in the bill, which was given by the said Samuel Stimpson to the said George Baker, was given in December, 1835, or January or February, 1836, at which time the land mentioned in the said deed was in the possession of the defendant or his assigns, the evidence of whose titles was all on record, and the said lands were then claimed to be the defendant's or his assign's,—all which facts were well known to said Baker at the time he made his said purchase of the said Stimpson.

Answers were also put in by Samuel A. Morse, M. J. Talbot, and Charles Peavy, wherein they stated the origin of their interests in the estates mentioned in the original bill. A cross-

bill was also filed by Timothy Whiting, Samuel A. Morse, and M. J. Talbot, charging a combination to purchase up stale or pretended titles, and praying for a dismissal of the original bill, a perpetual injunction in relation to the premises, and for further relief. The answer to the cross-bill denied all combination to purchase up stale or pretended titles, and concluded with a prayer for an injunction against Whiting, to restrain him from cutting and carrying away timber from the premises, or permitting timber to be cut and carried away.

Hobbs, Fessenden, and Deblois, for the plaintiffs. *Daveis and Mellen*, for the defendants.

STORY, J. Several objections were made to the present bill at the hearing, some of which involve matters of fact, and others matters of law. I will briefly state the opinion of the Court upon all the points suggested at the argument.

The first question is, whether the plaintiffs have shown any title whatsoever to maintain the present bill; or, in other words, whether they have shown any interest or estate in the land in controversy. The bill states, that Baker and his wife are entitled in her right to one-sixth of one undivided seventh part of the premises; and that Baker in his own right is entitled to one moiety of the premises in virtue of his purchase and assignment from Stimpson, who was owner thereof. Mrs. Baker inherited from her father, Jacob Tidd, one-seventh of the premises; and by the death of her brother, William Dawes Tidd, one-seventh of one-seventh; he dying after he came of age, and his mother being entitled to share with his brothers and sisters. By the deed of Baker and his wife to Howe, in December, 1835, they released their right and title to four-sixth parts of the premises; and the answer to the cross-bill insists that she never intended by that deed to part with the share derived from her brother. Be this as it may, it was very clear that she has not conveyed it by this deed, since her right is still retained to the remaining two-sixths of the premises. So that Baker and his wife are fully entitled to the whole share derived from her brother. The bill is, therefore, maintainable by the plaintiffs in her right, so far as this interest goes.

As to the title derived by Baker by the deed of release from Stimpson of one moiety of the premises, as the release was for a valuable consideration, and meant to convey all Stimpson's right and title, if it can not take effect as a release, it may be construed, in furtherance of the intention of the parties, as a bargain and sale, or other appropriate conveyance, *ut res magis valeat, quam pereat*. This doctrine I take to be now well settled at law. But in equity, there can be no question that it is fully established. The case of *Doungsworth v. Blair*, 1 Keen, 801, is directly in point, if, indeed, so plain a principle required any authority to support it. In that case it was held that an indenture which was intended to be an indenture of release, but could not operate as such, might, for the purpose of carrying into effect the real intention of the parties, if there was a proper consideration, be construed as a covenant to stand seised. The case of a valuable consideration is far stronger (a).

The main objection, however, taken to the operation of this deed, is that, at the time of this conveyance by Stimpson to Baker, the defendant was in full possession and *seisin* of the premises, claiming them in his own right, and of course, that Stimpson was then disseised, and the conveyance to Baker was void under the operation of the common law relative to maintenance and champerty, and the statute of 32 Henry VIII, ch. 9, made in aid thereof. This statute prohibits, under penalties, the buying or selling of any pretended right or title to land unless the vendor is in actual possession of the land, or of the reversion or remainder. The object of the statute, as well as of the common law, was doubtless to prevent the buying of controverted legal titles, which the owner did not think it worth his while to pursue, on mere speculation; so that in fact it might properly be deemed the mere purchase of a law-suit (b). The old cases upon this subject have gone a great way, further indeed than would now be sustained in courts of equity, which have broken in upon some of the doctrines established thereby. But be this as it

(a) See, also, 1 Story's Eq. Jurisp. sec. 168.

(b) 4 Black Com. 135, 136; Hawk. Pleas of the Crown, B. 1, ch. 83, sec. 1-20; Id. B. 1, ch. 84, sec. 1-20; Id. B. 1, ch. 86, sec. 1, sec. 4-17.

See also, hereinafter, *Boyd v. Blankman*, 29 California, 19. In this case the *cestui que trust* had sold her interest, and the same defense was set up.

may, neither the common law nor the statute applies to a trust estate actually existing, either by the acts of the parties, or by construction of law. Thus a *cestui que trust* may lawfully dispose of his trust estate, notwithstanding his title is contested by the trustee; for the latter can never disseise the former of the trust estate, but so long as it continues in the possession of the trustee it is treated, at least in a court of equity, as the possession of the *cestui que trust*. There can be no disseisin of a trust; although the exercise of an adverse possession for a great length of time may, in equity, bar or extinguish the trust. The whole question in the present case turns upon this, whether the defendant Whiting, at the time of his purchase of the premises at the sale for taxes, in August, 1821, was the agent of the heirs of Jacob Tidd, of Stimpson, and of other proprietors, of their undivided shares in the premises. If he was, then, upon the acknowledged principles of courts of equity, he, as an agent, could not become a purchaser at the sale for himself, but his purchase must be deemed a purchase for his principals. It matters not whether, in such a case, the defendant intended to purchase for himself, and on his own account, or not. For courts of equity will not tolerate any agent in acts of this sort, since they operate as a virtual fraud upon the rights and interests of his principals, which he is bound to protect. He was bound, as their agent for the premises, to give them notice of the intended sale, and to save the property from any sacrifice; and until he had openly and notoriously, and after full notice to the principals, discharged himself from his agency, he could not be permitted, in a court of equity, to become a purchaser at the sale. If, indeed, as there is much reason to believe, at the time of the sale, he had funds of his principals in his own hands, sufficient to meet the taxes—for *a fortiori*, if he endeavored to dissuade or to prevent other persons from becoming bidders at the sale, as some of the evidence states—his conduct was, supposing him to be agent, still more reprehensible. The validity of the conveyance, then, from Stimpson to Baker, depends upon the fact, whether the defendant Whiting was, or was not, the agent and mere trustee of the parties; and whether, if agent, *eo instanti*, that the conveyance under the tax sale was made to him, the law did not attach the trust to the lands in his

hands. If it did, then the conveyance of Stimpson to Baker was valid. If it did not, then it was void, as falling within the reach of the doctrines respecting maintenance, champerty, and pretended titles. Those doctrines do not apply to trusts created in privity of estate, but to adverse and independent titles between strangers. It is quite a mistake to suppose that a controverted trust may not be assigned by the owner, when it is clearly and unequivocally attached to property. If a contract is made for the sale of lands, the contractor may sell and assign the whole, or a part, or make a binding sub-contract respecting the same, whether there be a controversy respecting the specific performance of the original contract, or not. The case of *Wood v. Griffith*, 1 Swan St. 55, 56, is fully in point upon this doctrine, even when the assignment or sale is made during the pendency of a suit for a specific performance (a). I repeat it, therefore, that the whole question, whether the deed from Stimpson to Baker was a valid conveyance or not, depends upon the point, whether, at the time, the defendant was actually or constructively a trustee of the premises for Stimpson.

And, in my judgment, notwithstanding then the stern denials of the answer of Whiting, the fact of the agency of the defendant, at and before the time of the tax sale, for Stimpson, as well as for the heirs of Jacob Tidd, and other proprietors, is completely established by evidence altogether unexceptionable and conclusive. It is proved by acts done, which in no other way could be lawful, or indeed could be fairly accounted for. And it is also proved by written documents and receipts, which admit of no reasonable doubt (b). It appears, that as long ago as 1815,

(a) See, also, 2 Story on Eq. Juris. secs. 1048-1054; *Harrington v. Ford*, 2 Mylne and Keene, 590; *Harkley v. Russell*, 2 Sim. and Stuart, 244. In the case of *Prosser v. Edmonds*, 1 Younge and Call. 497, 498, there was no trust, but a mere naked right to set aside a conveyance for fraud, which distinguishes it from the present case.

(b) *Morris v. Joseph*, 1 West Va. 256, is the case of a trustee *de son tort*—manager of another's property, in the absence of the other. He allows the land to be sold for taxes by the sheriff. He becomes the purchaser. In an action of ejectment brought by him against the former owner, the defendant suffers judgment by default, "reserving equity." On his bill to set up the equity so reserved, the court enjoined the trustee from executing his writ of possession at law. The judge says: "We are of opinion that the appellant was the trustee and agent of Lefever."

the defendant Whiting became a purchaser, and, as such, a tenant in common with the other proprietors of these undivided lands. He undertook, at various times, between 1815 and the sale in 1821, as well as afterward, to grant written permits to different persons to go on the premises and to cut down timber thereon for their own use, for a compensation called, in the expressive language of the country, "stumpage," and for this compensation, he also, at several times, gave receipts. Now, as a tenant in common, he had no authority whatsoever, without the consent express or implied of his co-tenants, to grant any such permits, or to authorize any such acts. They are expressly prohibited, not only by the common law, but by the positive penalties of the statute of the State upon this subject. Those penalties are severe, and the law will never presume that a party does an unlawful act unless it is shown by some competent evidence. The presumption, in the absence of counteracting evidence, is, that it is done under lawful authority, if it might have been so done. A court of equity would, *a fortiori*, indulge in such a presumption in favor of a party, who is a tenant in common, that he acted as a common agent, for the common benefit of all the proprietors; since, in that way, he may promote the true interests of all. Indeed, all acts, done by one tenant in common, are presumed to be done for the interest of all the co-tenants, and in conformity to their rights, until an adverse claim is notoriously set up, and established by competent proofs. In the present case, upon this sole ground, in the absence of all counter proofs, the acts of the defendant Whiting up to the tax sale in 1821, ought to be deemed to be done by him as a tenant in common, acting for the benefit of all, and therefore acquiesced in by all.

But the case does not rest upon this sole ground, either of fact or presumption. The very permits and receipts afford satisfactory evidence, that the defendant Whiting did not act solely for himself; but that he acted for other proprietors. It is true that, in one case only, does he give a receipt in terms for the proprietors of the undivided lands for stumpage. But in all the other cases, and they are numerous, his receipts always purport to be "for the undivided lands," and never, in an instance, purport to be on his own individual account. This is very strong evidence

to establish the real nature of the transactions. If he was acting for himself alone, his silence on this point is wholly unaccountable; if he was acting for himself and other proprietors, then the language is clear and intelligible, and has its appropriate effect. In this way too, the acquiescence of his co-tenants can be easily explained. In any other view it would be utterly unaccountable. I have, therefore, no doubt whatever on this point, that the defendant Whiting was agent for Jacob Tidd during his life (and he died in March, 1821,) and afterward for his heirs (some of whom were, as it is said, at that time infants), as well as for Stimpson and other proprietors. If so, the purchase by him at the tax sale became immediately, by operation of the principles of a court of equity, a trust for the benefit of the principals.

Then, it is said, that plaintiffs are barred from any right in equity by the mere lapse of time. It does not appear what were the respective ages of the heirs of Tidd at the time of the tax sale, nor what was the age of Stimpson; and all of them were at the time (as it should seem) citizens of another State, and of course come within the common exceptions of statutes of limitations. But what is more particularly applicable to the present case, twenty years had not elapsed before the filing of the bill; and, I apprehend, that in the case of a trust of lands, nothing short of the statute period, which would bar a legal estate or right of entry, would be permitted to operate in equity, as a bar of the equitable estate. This doctrine seems to be admitted by the authorities ever since the great case of *Chalmondeley v. Clinton*, 2 Jac. & Walker, 1, and it has been repeatedly acted upon in the Supreme Court of the United States (a). Indeed, in the

(a) See the cases cited in 2 Story Eq. Jurisp., sec. 1520-1522; and Story's Eq. Plead., sec. 503, 751-759; and *Elmendorf v. Taylor*, 10 Wheat. 168; *Howell's Heirs v. M'Crory*, 7 Dana, 388. On p. 391, it is said by the Court of Appeals: "As this suit is brought, *not for damages for fraud*, but for a cancelment of the deed and a restitution of the land, it is virtually a proceeding *in rem*; and a prayer for a *cancelment* of the sheriff's deed is only subsidiary to the chief end of obtaining the land itself. Such a suit in equity should not be barred by adopting the legal limitation to an action for fraud, which confirms the contract. The only suitable analogy is an action for the land founded on a right of entry, which would not, as we think, be barred by a shorter limitation than that of twenty years, even though the defending party should rely on a fraudulent deed more than five years old. As long as the action itself is not barred by time, the right to prove any fact material to the maintenance of it, should not, in our opinion, be

case of *Prevost v. Gratz*, 6 Wheat. 484, it was broadly laid down, that, in equity, length of time is no bar to a trust clearly established, and that, in cases where fraud is imputed and proved, length of time ought not, upon principles of eternal justice, to be admitted to repel relief. This doctrine is regularly true, when it is received with the proper accompanying limitations, that no circumstances exist to raise a presumption from lapse of time of an extinguishment of the trust, and no open denial or repudiation of the trust is brought home to the knowledge of the parties in interest, which requires them to act, as upon an asserted adverse title.

Upon the whole, I am of opinion, that the purchase by the defendant must be deemed to be a trust for the benefit of the plaintiffs to the extent of their interests; that the defendant ought to be decreed to convey the legal title to them, after being satisfied of all just claims, which he has against the lands for taxes, for purchase-money paid at the tax sale, for his expenditures and improvements upon the land, and also for reasonable services as agent in the premises, deducting all sums of

barred by any statutory or proscriptive limitation. We have not seen a case in which a suit in chancery, to recover land and set aside a fraudulent deed in subservience to that end, was ever barred by the lapse of five years, or by less than what would bar a suit for the land, founded on any other equity; and we can perceive no reason or analogy which should prescribe any other limitation in the one case than the other. In each the object is the same, to wit, the land, or the security of the title thereto; and therefore, in each the limitation should be the same." See the authorities there cited, p. 392. And the court add, in *Blight's Heirs v. Tobin*, 7 Mon. 612: "This court decided that the statutory limitation to a motion to quash a sheriff's sale for fraud should not be adopted, by analogy, as a bar to a bill in chancery for the same purpose; and the same reason would apply equally to the limitation prescribed to an action for damages for fraud."

Findley v. Langford, 1 Marsh. 364. By the Chief Justice: "A lapse of less than twenty years from the accrual of the right of suit is no bar to the assertion of an equitable right in a court of chancery, as it would not be to the assertion of a legal right in a court of law."

Severns v. Hill, 3 Bibb, 240. 'Twenty years' possession is held, in chancery, by analogy to the law, to bar a recovery of real estate.

Patrick's Heirs v. Chenault, 6 B. Mon. 321, was a suit in chancery, and it was held that the plaintiffs were barred in twenty-three years after the death of their mother (from whom it was claimed they derived title), eighteen years after the death of the father, and when more than fifty years had transpired after the alleged mistake in the deed had been made, and which was then sought to be reformed.

money received by him in the premises for stumpage or otherwise. And it ought to be referred to a Master to take an account in the premises, and make a report thereof to the Court, according to the principles of this decree.

As to the other defendants, Peavy, Morse, and Talbot, no case has been made out against them of any fraud or misconduct, calling for the interposition of the Court. The bill will, therefore, be dismissed against them, with costs. But the plaintiffs are entitled to costs, upon the cross-bill, against the parties thereto, namely, Whiting, Morse, and Talbot, and may set them off *pro tanto* against the costs of the original bill decreed to Morse and Talbot.

The District Court concurs in this opinion, and a decretal order will be drawn up accordingly.

ALEXANDER BOYD v. H. G. BLANKMAN.

[*This case was decided at the October term, 1865, of the Supreme Court of the State of California, AUGUSTUS L. RHODES, Associate Justice, delivering the opinion. Reported in 29 California, 19.*]

If the administrator of an estate makes a sale of land belonging to the estate, under an order of the Probate Court procured by him, and at the sale becomes the purchaser through another person, who takes and holds the legal title in trust for the administrator, and afterward conveys it to him, the heir retains such an equitable interest in the land as is assignable, and the assignee may maintain an action against the administrator to enforce a trust.

If an administrator becomes a purchaser, through another person, of land of the estate sold by him under an order of the Probate Court, the heir retains the equitable title, and his deed conveys such equitable title, while the legal title is vested in the administrator who holds it in trust.

In such case the deed of the heir conveys the equitable title, and his deed is evidence of his intention to disaffirm the sale.

Where an administrator at his own sale becomes the purchaser, through another person, of land of the estate, there are strong reasons for holding that the relation of trustee and *cestui que trust* is not by the fact of the sale shifted from the land to the proceeds of the sale, but that the administrator remains a trustee as to the land until the heir affirms the sale.

If an administrator at his own sale, made under an order of the Probate Court, buys the land of the estate through another person, the sale is not void, but

only voidable at the election of the heirs or other persons interested in the estate, who may have the sale set aside and the administrator declared a trustee.

If the Probate Court, in a matter where it has jurisdiction, makes an order upon insufficient evidence, or contrary to the evidence, the order can not on that ground be attacked in a collateral proceeding.

If an administrator procures an order of the Probate Court for the sale of real estate to pay a debt which the administrator had previously paid with funds of the estate, it is not a fraud which will enable the order to be attacked in a collateral proceeding.

An order of a Probate Court to sell all the real estate of an intestate to pay debts, when the sale of a small portion would have been sufficient, can not for this reason be set aside in a collateral proceeding.

The fact that a person is unlearned and ignorant of legal proceedings, affords no ground of relief in equity, unless it also appears that he relied for information upon the person against whom relief is sought, and such person misrepresented the state of facts.

The Statute of Limitations is applicable alike to causes of action in equity and at law.

When the cause of action stated in the complaint is for relief on the ground of fraud, and is stated to have accrued more than three years before the commencement of the action, the complaint should also aver that the acts constituting the fraud had been discovered within three years; but if the replication contains this averment, and this issue is tried without objection, the irregularity in the manner of presenting the issue will be disregarded.

A defendant relying on the Statute of Limitations should not allege matter of law, but the facts which bring him within the statute.

An answer stating that the cause of action has not accrued within five years, is sufficient for five years; and for any period of limitation named in the statute, less than five years.

The clause in the seventeenth section of the Statute of Limitations, providing that an action for relief on the ground of fraud shall not be deemed to have accrued until the discovery of the facts constituting the fraud, is applicable to constructive fraud as well as fraud in fact.

An action for relief on the ground of fraud may be commenced at any time within three years after a discovery of the facts constituting the fraud, or of facts sufficient to put a person of ordinary intelligence and prudence on inquiry.

APPEAL from the District Court, Fourth Judicial District, city and county of San Francisco.

Jack Hina died at the city of San Francisco, intestate, on the 3d day of October, 1850, leaving Mary Hina, his widow, him surviving, his sole heir.

The said Mary Hina, and the defendant Henry G. Blankman, were appointed administrators of the estate of said Jack Hina, deceased, and duly qualified as such, and took upon themselves the duties of such administrators.

The property and assets of such estate were the lands and premises described in the complaint, being fifty-vara lot number two hundred and eighty-two on the official map of San Francisco, and there came to the hands of the defendant, as administrator, the sum of eight hundred and ninety dollars in cash, and there was other personal estate of the value of about two hundred dollars.

Said lands and premises were subject to an incumbrance, by way of mortgage, in the sum of seven hundred dollars, executed by said Jack Hina in his life-time, bearing interest at the rate of ten per cent per month, on which interest was paid by Jack Hina in his life-time, to the 24th of August, 1850.

On the 16th day of December, 1850, the defendant, as administrator, presented a petition to the Probate Court for the sale of said lands and premises to pay said mortgage debt and expenses of administration, in which petition the said Mary Hina, co-administrator, was not joined.

The only debt or claim against the said estate, excepting the costs and expenses of administration, was the said mortgage debt.

On the 24th day of December, 1850, and while the proceedings for a sale were pending in the Probate Court, the defendant Blankman paid the amount due on said mortgage to the mortgagee, and procured and caused the said mortgage to be assigned to one Joseph B. Bidleman for his, the said Blankman's, benefit.

Said Blankman continued to prosecute said application before the Probate Court for a sale of said premises, and obtained an order for such sale, and on the 15th day of February, 1851, said premises were put up for sale at public auction, and struck off to one William A. A. Reis, as the purchaser, at the price and sum of fourteen hundred and fifty dollars, and a conveyance was made by said Blankman, as administrator, to said Reis, but in fact for the benefit of the defendant Blankman, and no money was in fact paid by said Reis on such sale and purchase.

On the 10th day of April, 1851, the said Reis conveyed the said lands and premises to said Joseph B. Bidleman, who took said conveyance, and held said lands thereunder, in trust and for the benefit of said Blankman.

On the 19th day of February, 1851, the said Blankman caused an action to be commenced, in the name of the said Joseph B. Bidleman, as plaintiff, in the District Court of the Fourth Judicial District, wherein said Blankman, as administrator, and said Reis, were made defendants, and were the only defendants, for the purpose of foreclosing said mortgage and selling said premises. A judgment and decree was rendered in said action, by and with the written consent of the defendants therein, for the foreclosure and sale of said premises; and on the 31st day of March, 1851, said premises were put up for sale under said decree, and struck off to said Joseph B. Bidleman, as the purchaser, for the sum of eight hundred and fifty-eight dollars, but in fact for the benefit of said defendant Blankman; and on the 1st day of April, 1851, the sheriff executed a deed to said J. B. Bidleman, as such purchaser, who took the same in trust and for the benefit of said Blankman.

Afterward, and in the month of April, 1851, the said Blankman caused an action to be commenced and prosecuted in the District Court of the Fourth District, in the name of the said Bidleman, as plaintiff, but for the benefit of said Blankman, and against the said Mary Hina, as defendant, to recover possession of said lands and premises, and such proceedings were had that judgment was recovered in favor of the plaintiff therein for the possession of said premises; a writ of execution was issued on said judgment, and was executed on the 12th day of June, 1851, by removing said Mary Hina from the premises, and putting said Bidleman in possession thereof.

On the 20th day of December, 1851, the said J. B. Bidleman made, executed, and delivered to said Blankman a deed of conveyance of said premises, which conveyance was therein expressed to be for the consideration of fifteen hundred dollars, but no consideration was in fact paid, or agreed to be paid; and such conveyance was made at the request of said Blankman, and without any consideration, which said conveyance was acknowledged and duly recorded in the office of the recorder of the county of San Francisco, on the 3d day of January, 1852.

Said Mary Hina left and removed from the city and county of San Francisco about the month of June, 1851, and after she was removed from the premises under the aforesaid writ of

execution, and has ever since resided in the county of El Dorado, in this state, more than one hundred and fifty miles from the city of San Francisco, and never returned to the said city and county till after the commencement of this action.

On the 18th day of April, 1851, the said Blankman rendered his final account, and was discharged by the order of the Probate Court from his office as administrator of said estate.

On the 28th day of February, 1861, the said Mary Hina sold, assigned, transferred, and conveyed to the plaintiff the said lands and premises, and all her rights and interests therein and her claim thereto, and to the rents during the time the said Blankman had held and enjoyed the same.

In 1861, just before the commencement of the action, Bidleman first informed Mary Hina that he had purchased the property in trust for Blankman, and at Blankman's request, and paid no consideration for it. Blankman had never given her this information.

The court below found that there was no fraud in fact, and also found that the knowledge that the purchase and sale of the property at the probate and foreclosure sales were made in trust for the defendant Blankman, came to the knowledge of Mary Hina more than five years before the commencement of the action.

The action was commenced in March, 1861. The court below rendered a judgment for defendant, and plaintiff appealed. The other facts are stated in the opinion of the court.

Doyle and Barber and Delos Lake, for appellant. *E. W. F. Sloan*, for respondent.

By the Court, RHODES, J. This action was brought to establish and enforce a trust in favor of the plaintiff, as the grantee and assignee of Mary Hina, the heir at law of Jack Hina, deceased, as to certain premises, that the defendant purchased at his own sale as administrator; and as incidental to the relief sought in respect to the alleged trust, the plaintiff prayed for an account of the rents and profits, and for the delivery of the possession of the premises.

The mortgage executed by Jack Hina in his life-time, which

it is alleged the defendant fraudulently procured to be assigned and foreclosed, and the sale and conveyance of the premises which it is alleged were fraudulently made for the benefit of the defendant, may be dismissed from consideration, except so far as those matters bear upon the question of fraud in procuring the order of sale from the Probate Court, as the legal title, which was then in Mary Hina, was unaffected by those proceedings, because she was not made a party to the foreclosure suit. The questions we shall first consider, grow out of the fact charged by the plaintiff, and found by the court below, that the defendant, while acting as one of the administrators of Jack Hina, deceased, purchased the premises *per interpositam personam* at his own sale, which he made under the order of the Probate Court. It is alleged in the complaint that the proceedings in the Probate Court, for the purpose of procuring the sale, and the sale itself, and all proceedings connected therewith, are wholly fraudulent and void. The plaintiff's counsel, however, contends that the sale is void only at the instance of the *cestui que trust*, that is to say, that the sale is voidable. His position is, that Blankman, in selling the property as administrator, acted as the trustee of the heir; that his sale to himself did not discharge the trust; that the heir, as the *cestui que trust*, possessed the right to affirm or disaffirm the sale, and that such right was incident to the equitable estate which she possessed in the property. The defendant's position is, that the sale was voidable only at the election of the heir, and coupled with that, is the further position that by the sale she became divested of every assignable right or interest in the land.

Effect of purchase, by an Administrator, at his own sale, made by order of the Probate Court, of Land belonging to the Estate.—We may say here, that we can not assent to the latter position of the defendant. If it is admitted that anything passed by the sale, it must be conceded that the legal title passed; and after the administration is closed it would be difficult to charge the defendant as trustee in respect to the real property, unless he was vested with the legal title; but in regard to the equitable title, we are of the opinion that Mary Hina, by her deed to the plaintiff, gave evidence of her determination to disaffirm the sale; that at the time of its execution she held the

equitable title as fully as before the sale, and that by her deed she conveyed such equitable title to the plaintiff. And it admits of serious doubt whether the sale, confessedly in contravention of the rules of equity, even temporarily "set afloat" her equitable interest, so that an act of disaffirmance was necessary in order to attach it again to the property. There are strong reasons for holding that upon a sale of this character, the relation of the *cestui que trust* is not, by that fact alone, shifted from the property to the proceeds of the sale, but that in order to cut her off from any recourse upon the land, and restrict her to the proceeds, there must be either some positive act of affirmance of the sale, or such an acquiescence in it, manifested by the receipt of the proceeds, or by a delay beyond the period fixed by the Statute of Limitation, in commencing proceedings to set it aside, or in some other manner, that the Court will deem it equivalent to, and presumptively a ratification of the sale. By her disaffirmance, she elects to have the legal title held as it was before the sale, and have the property remain subject to all the trusts with which it was formerly charged. In the absence of a disaffirmance, that is to say, of an assertion of her interest in the land within a reasonable time, the equitable interest of the *cestui que trust* is presumed to have become united to the legal title, in the hands of the trustee holding adversely to the *cestui que trust*. An illustration may be found in the case of a will, that gives to any legatee a portion of the estate of the testator, and to another legatee some of the first legatee's property. The will, of itself, does not divest the first legatee of any title to his own property, but his affirmance of the disposition made by the will, manifested by his election to take under it, is held in equity to pass his interest in what was his own property to the second legatee; and if he relies upon his right, independent of the will, it can not be said that he was, at any time, even temporarily divested of the title to his property that was attempted to be bequeathed. The right of election in the *cestui que trust* to affirm or disaffirm the sale must have for its support some interest in the premises sold. He can not acquire the equitable title by mere assertion, nor can it with much show of reason be said, that by indicating his election to have the legal title restored to its original status, he acquires any right or title he did not possess before making the election.

Sale of Trust Estate and purchase of same by the Trustee who holds the legal title.—In a case where the trustee holds the legal title, and the trust is to be executed by a sale of the property for money, and the trustee becomes the purchaser, and holds in his hands the money representing the purchase money, ready to be paid over to the *cestui que trust*, the money, evidently, is not the money of the *cestui que trust*, as it would be considered had the sale been properly made to a third person, and it does not become his property until he elects to affirm the sale and receive the money; and if it is true that the purchase by the trustee divests the *cestui que trust* of his equitable interest in the land, then it follows that there is a time—the time intervening between the sale and the election by the *cestui que trust*—that he owns neither an interest in the land nor the money arising from its sale. Instead of saying, in the language of many of the cases, that the sale, as between the trustee and *cestui que trust*, is good unless the *cestui que trust* elects to avoid it, is it not more accurate to hold that the sale will become good, unless the *cestui que trust* elects to avoid it, before its ratification may be presumed from the lapse of time or other sufficient circumstances?

Is the purchase by an administrator, of the land of the estate, at his own sale, void, or is it merely voidable? [That part of the opinion embraced under this heading is omitted, because of its being, to a great extent, a repetition of the same rules governing the trustee, as will be found in *Davoue v. Fanning*, preceding page 1, and the other authorities to this point quoted therein. As shown in the Syllabus, the court decided what is now almost universally admitted to be the rule: That such sales are voidable on the election of the *cestui que trust*. That part of the opinion treating of the “Statutes of Limitations” is also omitted. The Syllabus gives the result arrived at by the court.]

Fraud by an Administrator in procuring an order of sale of land without necessity.—Actual fraud is alleged and relied on by the plaintiff, and he assigns as error the finding of the court against him on that issue. The fraud complained of, stated generally, consisted in the administrator's having procured an order of sale from the Probate Court, when there was no necessity for it. He represented in his petition, filed December 18th, 1850, that the estate was indebted seven hundred and seventy

dollars on the Biron mortgage, and about two hundred dollars for other debts, and that the personal property was insufficient to pay the debts and the expenses of administration. His final account, filed April 2, 1851, shows that on the 23d of October, 1850, he received from Mary Hina eight hundred and ninety dollars on account of the estate. Instead of applying the money to the satisfaction of the mortgage, he purchased it in the name of Bidleman, for his own benefit. Doubtless the interest for two months—one hundred and forty dollars—was paid out of the money paid to him by Mary Hina. So far as the order of sale is concerned, and the fraud imputed to the defendant in procuring it, without any necessity, it would make no difference whether he left the mortgage unpaid in Biron's hands or caused it to be assigned to himself or to some third person for his use, for, having the funds in his hands, that might and ought to have been applied to the satisfaction of the mortgage, he should have taken the necessary steps to have procured an order that the funds in his hands be applied to that purpose; and the wrong consists in the fact that he procured an order of sale to raise money to satisfy a debt, which either had been paid or ought to have been paid out of moneys in his hands belonging to the estate. The administrator was without justification, so far as appears from the evidence, in procuring an order of sale to raise means to pay that debt. The payment might have been made soon after the receipt of the money in October, and at that time the payment of the mortgage and two months' interest, requiring eight hundred and forty dollars, would have left in his hands fifty dollars. It is not charged, nor does it appear in the case, that any of the property of the estate, except the sum of eight hundred and ninety dollars, and the lot in controversy, came to the possession of the defendant, and we may presume that the articles included in the inventory under the items "stoves, chairs, and household furniture, two hundred dollars; trunk and clothes, one hundred dollars," remained in the possession of the widow of the deceased; and it is not alleged that they came to the defendant's hands. At the time of filing the petition for sale, there had been allowed the claims of appraisers and others, amounting to two hundred and ten dollars, and although the claims may seem exorbitant, yet they had been allowed by the probate judge as well as by the

administrator; and, as valid claims against the estate, they, together with the administrator's fees, accruing and accrued, were required to be paid; and the administrator, not having funds in his hands sufficient for that purpose, was authorized and it was his duty to have raised the required funds out of the real estate by sale or otherwise. A sale of a small portion of the real estate would probably have been sufficient; but the Probate Court had jurisdiction, and we think the exclusive jurisdiction, to determine what portion of the real estate should be sold for that purpose; and although the court may have erred in that respect, its judgment can not be revised or set aside in this collateral manner. The error can be reached only by an appeal taken directly from the order of that court (a).

And the same may be said in respect to the order of sale, so far as it is founded on the alleged indebtedness on the mortgage, conceding that it had been paid (considering the assignment to Bidleman for the defendant as a payment by the estate, or as vesting the mortgage in the estate), or that it was not a subsisting claim against the estate, or that it ought to have been paid by the administrator, still those were facts to have been proven before the Probate Court, on the hearing of the petition for sale. It is manifest that it was quite susceptible of proof, that the administrator had in his hands funds that should have been used for that purpose, and if those interested in the estate failed to offer the evidence, they are in default; and if it was offered and was rejected by the court, or having been received, the court, notwithstanding the evidence, ordered the lot to be sold for the payment of the mortgage, it was error which might

(a) In *Blight's Heirs v. Tobin*, 7 Mon. 612, the court says: "We do not mean that a chancellor, in exercising this jurisdiction, will act as a revising court over the records of a court of law in executing their process, or make further use of errors of law than to prove or disprove the fairness or unfairness of the sale. We will treat all the proceedings at law as valid, although error may appear therein, and will relieve against the consequences thereof, because the rights acquired thereby can not be retained in conscience; and in doing so, we will treat the purchaser as a trustee of the estate, and will not compel him to surrender it until equity is done to him." See, also, *Talbott v. Todd*, 5 Dana, 193: Bill to impeach decree on the ground of fraud. *Per curiam*: "Where a fraud has been practiced by reason of the confidential relation of the parties, and carried into the decree, it will not sanctify the fraud, or put it beyond the power of a chancellor to rectify the matter."

have been corrected on appeal; but if not so corrected, was final and conclusive upon the parties to the petition. The fraud, then, in procuring the order of sale, so far as the mortgage debt is concerned, amounts to this: that the administrator procured an order, either upon insufficient evidence, or contrary to the evidence that was accessible to the heir at law, and was or might have been introduced by her, which, instead of being a fraud of which another court will take cognizance, is but the case of an error in the judgment of the Probate Court, or of neglect on the part of one of the parties to present his case; and we agree with the learned judge of the court below in his finding, that there was no actual fraud in procuring the order of sale, and in holding that, in relation to the necessity of the sale, the plaintiff is concluded by the order declaring that it was necessary, and directing it to be made.

Ignorance as a ground of relief in Equity.—It is proper to remark here, that we do not concede as much force and consequence, as do the counsel for the plaintiff, to the fact that Mary Hina was an ignorant Kanaka woman, unacquainted with legal proceedings, and almost ignorant of our language. We can not obliterate the recognized rules of law, requiring of all persons the diligence and attention demanded of a prudent man in the transaction of his own business, and establish a measure of care and diligence for each particular case. If she did not understand the value of the receipt she said Blankman gave her for the money she paid him, or if she did not comprehend the meaning or the object of the petition for sale, unless it is also proven that she relied upon Blankman for information respecting these matters, and that he misrepresented them, her ignorance of their objects, value, and meaning, affords no grounds for relief.

Judgment reversed, and cause remanded for a new trial.

Mr. Justice CURREY and Mr. Justice SAWYER, being disqualified, did not sit in the cause.

THE BOARD OF SUPERVISORS OF KANE COUNTY, *et al*, v.
AUGUSTUS M. HERRINGTON, *et al*.

[*This case was decided at the January term, 1869, of the Supreme Court of the State of Illinois, SIDNEY BREESE, Chief Justice, and CHAS. B. LAWRENCE and PINKNEY H. WALKER, Justices, the opinion being delivered by Justice WALKER. Reported in 50 Illinois, 232.*]

When the owner of a claim to Government land sold a portion of his claim to another, and the vendee, in consideration thereof, agreed to pay to the Government the money necessary to secure the remaining interest in such claim to his vendor, and the money was paid, but before it was paid the vendor died, the money so in the hands of the vendee was held in trust for the heirs of the vendor, and when applied to the purchase of the remaining interest in the land, the equitable interest of the heirs in the money attached to the land, and an estate in trust in favor of the minor heirs resulted therefrom. Resulting trusts are not embraced in the statute of frauds, but only express trusts, resting in parol, or other verbal agreements for the sale of lands, are within the purview of the statute.

Where property, in which minor heirs have an equitable interest, is being improved by the party claiming the legal title, they are not bound to give notice of their rights, and would not be estopped because of their failure to do so; for, as minors, they are not capable of estopping themselves, simply by failure to assert title.

If persons who have an equitable claim to real estate, assent to, and acquiesce in, acts performed in relation to such estate, by one holding the same in trust for the equitable claimants, such acts of the trustee being inconsistent with their equitable rights, they, by such assent and acquiescence, will be estopped from afterward asserting their equitable claim.

The time in which equitable claim to realty should be asserted, is controlled by the analogies of the law; and, if twenty years are allowed to elapse, after the statutory disability of the claimant ceases, without asserting such claim, he is thereby placed without the pale of chancery relief.

As a general rule, a tenant is estopped from questioning his landlord's title, when sued for possession. But when, upon eviction under a paramount outstanding title, he has attained to the true owner, he is not estopped from setting up the eviction, and the title under which the eviction was had, as against the claim of his lessor.

So, also, when the landlord has aliened the demised premises, and sues the tenant in ejectment, the tenant may defeat the recovery by setting up the conveyance. But, as in this case, where a party, holding the equitable title to real estate, takes a lease from the party holding the legal title, the former is not estopped from asserting his equitable title as against his lessor, the latter being left, precisely, and in every particular, in the same position he was before the leasing, having incurred no further, other, or greater liability in regard to the premises in controversy.

The regularity of the proceedings in a submission to arbitration can not be questioned, where, by long acquiescence, it has acquired such force that the parties in interest would be held to its terms. So, where a bill in chancery, to compel a conveyance of certain premises, was filed February 5, 1864, the defendants can not set up any irregularity in the proceedings in a submission to arbitration, which occurred June 5, 1838, to defeat the claimant's title to any portion of the premises in controversy.

In a suit in chancery, brought by heirs, a disclaimer by one or more of the heirs, to any interest in the premises in controversy, does not vest the interest so disclaimed in the remaining heirs.

A owned a claim to Government land, and sold a portion of his claim to B, in consideration that B would pay the Government a sum sufficient to secure the title to the remaining portion in A. Afterward A died, and the purchase by B was made and perfected after his death. *Held*, that B held the money in trust for the heirs of A, and that, by a subsequent payment of the money to the Government, the equitable interest of the heirs in the money attached to the land, and an estate in trust was thereby created. But after the death of A, and before the money was paid by B to perfect the title in the heirs of A to the remaining portion of his claim, one of the heirs died. *Held*, that such heir, having died before the money so in the hands of B passed into the land by the subsequent purchase, did not have an estate of inheritance in such purchase that could pass by descent to his heirs.

APPEAL from the Superior Court of Chicago, the Hon. JOHN

A. JAMESON, Judge, presiding.

This was a bill in chancery, exhibited in the Kane County Circuit Court. The cause was removed by a change of venue to the Superior Court of Chicago. The bill was filed February 5, 1864, and upon the hearing a decree for the claimants was entered. The defendants below bring the cause to this Court. The further facts in this case are fully stated in the opinion.

Messrs. *Gookins* and *Roberts*, for the appellants. Messrs. *Miller*, *Van Arman*, and *Lewis*, for the appellees.

Mr. Justice WALKER delivered the opinion of the Court. The widow and heirs of James Herrington, deceased, filed their bill in the Kane Circuit Court, against the board of supervisors and others, as officers and agents of the county, to enjoin a sale and compel a conveyance of lots 9 and 10, in block 52, in the town of Geneva. It appears that the lots had been for many years used for county purposes, and on which a courthouse, jail, and recorder's office had been erected. The bill alleges that the county holds the property in trust for com-

plainants, and seeks to have the trust executed by a conveyance.

The bill alleges that one Haight, in the year 1835, settled on the quarter of land, of which the lots in controversy are a part, and that the land was then unsurveyed; that he sold his claim to Herrington, the ancestor of complainants, who went into possession and resided on it until his death, which occurred in 1839. After his death his widow and heirs continued to reside on a portion of the tract; in June, 1836, Herrington sold an undivided three-fourths of his claim, excepting two acres on which his house stood, to one Hamilton, who afterward sold different portions to various persons; in June, 1836, the commissioners appointed for the purpose, located the county-seat on this claim; that Herrington and Hamilton laid out the village of Geneva on this claim, and recorded the plat; proceedings were instituted in the Kane Circuit Court for the purpose of obtaining partition among the several claimants of the property; this proceeding was commenced at the May term, 1840, of the Circuit Court, and Daniels, Hamilton, and Madden were plaintiffs, and Herrington was defendant. From these proceedings it appears that, on the 5th of June, 1838, these parties entered into an arbitration bond, by which King, Hubbard, and Dunham were chosen to arbitrate, award, order, appraise, divide, and set apart and determine the parts of the town of Geneva to which the parties, and those claiming under them, were entitled. Herrington's two acres, and certain other portions of the property, including that in controversy, were excluded from the submission, and reserved to Herrington.

In 1840, the lands in that section of the state having been surveyed, it was found that the tract upon which the county-seat had been located was the south-east quarter of section 3, township 39, range 8. This land was purchased by the county in 1841, the complainants furnishing their share, and other persons interested the residue of the purchase-money, they holding the equitable, and the county the legal, title to the quarter.

The answer denies that complainants had a pre-emption right; admits Herrington's death and the heirship of complainants; insists that the county was not bound by the arbitration proceedings, as they were void, because neither the county, nor

its grantor, were parties to it; because the Government then owned the land; admits the laying out of the town, and the purchase by the county in 1841, but denies that complainants then claimed any interest in the land, or furnished any portion of the purchase-money; that by general consent of the citizens, who furnished the purchase-money to enter the land, there was conceded to Mrs. Herrington the interest which her husband claimed in the property in 1838, on her paying the cost and expenses, pursuant to which understanding the county has, from time to time, conveyed to her, or to others on her request, her share, all of which had been done prior to 1854.

That in 1837-8 a court-house and jail were erected, on 41 and 43, where they continued until 1843, at which time, owing to the principal settlement of the town being along Fox River, and the desire of the citizens for their removal, their location was changed. Mrs. Herrington then occupied block 53, when it was agreed between her and the county, that in lieu of any interest she had in the lots in controversy, she should take lots 1 and 2, in block 51, which arrangement was carried into effect, and the county proceeded to erect the court-house, jail, and recorder's office on the lots in controversy; that these buildings were used by the county until in 1858, when new county buildings were erected in another locality, to which the county records were removed; that Augustus M. Herrington, on the removal of the county records, took a lease of the recorder's office for three years, at a rent of \$40 per annum, conditioned that, should the property be sold, he would render possession; that the county owned lots 1 and 2, in block 51, in fee, and they so remained until 1853, when, on the written request of Mrs. Herrington, they were conveyed to complainant, James Herrington. It is alleged that complainant knew the facts, and recognized the right of their mother to contract and dispose of the property, and knew of the conveyances made on her orders, and to which they never interposed any objection; that James still claims lots 1 and 2, in block 51, and has never offered to reconvey them. The answer relies upon an estoppel *in pais* by the various acts of complainants, also upon possession for over twenty years, and the staleness of complainants' claim.

It appears that Mrs. Tuthill, one of the heirs, and her

husband, entered a disclaimer of any claim to any interest in the land, and the bill was dismissed as to them, by an order of the court. The evidence also discloses that Herrington, in his life-time, sold an interest in some water-power, situated on his claim, to one Strode, and he, by a written contract then executed, agreed to advance the money necessary to pay the Government for Herrington's fourth of the quarter. Strode afterward sold his claim to Sterling, who obligated himself to pay that amount for the entry of the land, and he testifies that he did pay the necessary sum to Fletcher for the purpose, and the latter swears that he used it in entering the land. Thus it is seen that the money used for the purchase of the Herrington interest was due to the estate, and in which the heirs had an equitable interest, and it was applied to the purchase of a claim and improvements held by their father at the time of his death.

And as the money to which the heirs were equitably entitled was employed in purchasing the land and improvements upon which their father lived, at the time of his death, the equity in the money attached to the land, and as their money paid for the land, without their consent, they being minors and incapable in law of consenting, the law implied a trust which resulted in their favor when the land was purchased, and the county became their trustee, and this trust was fully recognized by the county in reference to this as well as other interests, when Fletcher was appointed as the agent of the county to make deeds of conveyance on behalf of the county, so as to vest in these, and other beneficiaries the legal title. And he, supposing that Mrs. Herrington had the legal right to control this interest, at various times made conveyances to different persons on her request, who no doubt thus acquired title, unless chargeable with notice of the equitable interest of the heirs.

The heirs, then, having become vested with this interest as a resulting trust, the statute of frauds could not avail, even had it been relied on in the pleadings. It has been repeatedly held that such trusts are not embraced within the statute, but only express trusts resting in parol, and other verbal agreements for the sale of lands, are within the purview of the statute. It then follows that these complainants were, in equity, entitled to the portion of the lands awarded to Herrington, and the lots in

controversy are a part thereof, unless they have done some act which has divested them of their title, or which has estopped them from its assertion.

These who were minors could not be estopped, by reason of their failure to give notice to the agents of the county that they claimed interests in the property while the county buildings were being erected. In law they were not capable of estopping themselves simply by failing to assert title. The county being the trustee, is presumed through its agents to have known the character of the title, and the record shows it did know, as the order which was entered of record by the county commissioners, authorized Fletcher to convey lots one and two in block fifty-two, to Mrs. Herrington, upon her filing with him a sufficient release of all her interest, or such as the heirs of Herrington might have to lots nine and ten in block fifty-two, and the order states that it was entered at the request of Mrs. Herrington. By this order the county authorities admit that the heirs had an interest in the lots in controversy, and requires their agent to extinguish it before he conveyed lots one and two. Thus it appears, the county authorities acted upon full information that the heirs had an interest in these lots, when they erected these buildings, nor have they shown that a release of that interest was ever acquired from the heirs.

It is urged that the arbitration was inoperative, as Herrington had died before it was published and became a matter of record. We do not conceive that it was material that it should have been binding on the parties at the time, as by long acquiescence it has acquired such force that the parties in interest would be held to its terms, and such would be the effect of a parol agreement after such an acquiescence. Moreover, none of the parties whose interests were affected by it are now complaining of its terms or provisions. Nor do we see that the county has any right to question the validity of the arbitration, as they had previously recognized the heirs and their mother as having all of the equitable rights that existed to these lots.

Nor, as urged by counsel for appellant, can the claim be regarded as stale. Twenty years have not elapsed since all the heirs have come of age, and unless the suit would have been barred had the action been at law, it can not be held to be stale. If,

however, any portion of the heirs were of age when the county entered into possession, and twenty years have elapsed before this suit was brought, then the result would be otherwise, as to such heirs. Where the Statute of Limitations would bar an action at law, and the matter is litigated in chancery, the latter tribunal, following the analogies of the law in such cases, would hold the claim to be stale, and refuse the relief sought.

We think that the evidence in this record proves that the county gave, or agreed to give, lots one and two in exchange for lots nine and ten, and all of the complainants who were of age at that time and assented to the arrangement, are estopped from claiming any interest in this property. And those who have dealt with lots one and two as their own, or as belonging to the heirs, are likewise estopped. It then follows, that Mrs. Herrington, by directing these lots to be conveyed to James, and he by receiving the conveyance and appropriating them to his own use, were estopped from claiming any right to the lots in controversy.

If A. M. Herrington was of age, as is contended, when the lots were exchanged, he may have so acted as to be estopped from now asserting title. We have seen that his mother acted with the property as though she held the equitable title, or at least as though she was the agent fully empowered by the heirs to sell and dispose of the property. And if he was of age, knowing that his mother was so acting, we may presume these acting for the county believed she had the right to control the equity, and that by the exchange the county were uniting the equity with the fee, which it held. Having reason to believe that the county was thus acquiring the equity, and he knowing that his mother claimed to have power to release and dispose of the equity to these lots, it became his duty to assert his claim and thus give notice to the county agents, that they might have avoided the large outlay incurred in these improvements. If not under disability, he should then have given the notice, and failing to do so, it would be inequitable to permit him now to assert his title. Had the county taken possession without the arrangement made with Mrs. Herrington, it would, no doubt, have been otherwise.

As to whether A. M. Herrington occupied the recorder's office under a lease from the county, there seems to be a conflict of testimony. He swears positively that he did not lease it of the

county, and his brother James says he refused to lease it, but having been ordered by the board to lease it to his brother, on terms named in the order, he afterward reported that he had leased it as required. On the other hand, Vining and Brown, members of a committee appointed by the Board of Supervisors to confer with him, say that he offered to pay thirty dollars per year for a lease, and it appears that it was upon their report that the order for the lease was made. But conceding that he did take the lease, it does not follow he would be estopped to assert his equitable title. As a general rule, a tenant is estopped from questioning his landlord's title, when sued for possession; but to this rule there are some exceptions—as where the tenant has been evicted by a paramount outstanding title, and has attorned to the true owner, he may, when sued by the person from whom he leased, show the eviction and set up the title under which the eviction was had.

In such a case, the eviction under a paramount title terminates the former relations existing between them. So, if the landlord aliens the demised premises and sues the tenant in ejectment, the tenant may defeat a recovery by showing the conveyance.

Again, a party may estop himself by permitting other persons, with his knowledge and assent, or encouragement, to purchase property which he owns, and thus to expend their money without notice. In such a case, it is held to be a fraud, that estops him from afterward asserting title. In taking this lease there was nothing done which induced the county to expend money or incur liability, but the county was left in every particular, precisely as it was before. Had the county erected buildings afterward, or had a person purchased of the county on the supposition this lease created ownership in the county, then it would fall within the cases referred to in appellant's brief (a).

Mrs. Tuthill and husband having disclaimed any title to the premises, it follows that the other claimants would have no right to her share, and any decree giving it to them would be erroneous. Nor can the other complainants claim the interests of those who have been estopped from claiming any portion of these lots.

(a.) See as to estoppel, *Goodin v. Whitewater Canal Co.*, preceding, page 121; and note thereto appended, page 130.

It is insisted, that all of the heirs having died, his interest was inherited by the mother and brothers and sisters, and that Mrs. Herrington, if entitled to any interest in the property, was entitled to an equitable fee in the share of that child, and that the decree finds no such interest. If we understand the evidence correctly, that heir died soon after the father, and before the purchase of the land, and if so, that heir had no interest in the land at the time of his death, and by no known principle of law could any subsequent interest be vested in a deceased person.

The decree of the court below is reversed and the cause remanded. DECREE REVERSED.

JOHN M'DONNELL v. HENRY WHITE.

[*This case was decided in the House of Lords, in 1865, Lord Chancellor WESTBURY delivering the opinion, and Lords CRANWORTH and CHELMSFORD concurring. Reported in 11 House of Lords Cases, 570.*]

Though the rule as to limitation by time does not apply in the case of express trusts, yet, as to them, in equity the general rule is, that stale demands are not to be encouraged.

In taking accounts against a trustee, when he is to be fixed with a personal liability, his good faith is to be considered, and every fair allowance is to be made in his favor, especially if the demand against him is one which arose many years ago, and the beneficiary was at the time cognisant of all the matters connected with it.

A, being greatly in debt, executed a deed of trust for the benefit of creditors, and among the property assigned under the trust deed was a lease for lives renewable forever, on which the rent reserved was really a high rack-rent; the tenant complained, and the trustee, with the knowledge of A, though without his consent, but with the full assent of A's brother, to whom A had committed the management of his affairs, received from the tenant an abated rent; A complained of the abatement, but he took no steps to put an end to it. *Held*, that the estate of the trustee could not, after the expiration of the trust, be called upon to make up the deficiency.

While the trust was in existence, A, who had been absent from the country, returned, was informed of all that had occurred, and made an affidavit in a suit then pending, which had been instituted by one of his creditors. In this suit a receiver was appointed over one of the estates included in the trust. *Held*, that from the date of this appointment the power of the trustee was at an end, and that, as by the law of Ireland, the receiver's duty related as well to the arrears then due from the tenants of that estate as to those which afterward would become due, and consequently, no steps having been taken to enforce

payment from the trustee of arrears which, before the appointment of the receiver, he had suffered to accrue, his estate could not, after the lapse of many years, be made liable for those arrears.

THE Attorney-General, *Sir B. Palmer*, and the Solicitor-General for Ireland, *Mr. E. Sullivan*, for M'Donnell. *Mr. Isaac Butt*, of the Irish bar, and *Sir H. Cairns*, for *Mr. White*.

The Lord Chancellor, Lord WESTBURY: My Lords, this appeal is presented in a suit which was instituted by the late Sir Joseph Hoare, in the Court of Chancery, in Ireland, in the year 1841, for the purpose of taking the accounts of a trustee named Maziere, long since dead, which accounts were to be taken as to certain estates comprised in a trust deed for the benefit of creditors, executed by Sir Joseph Hoare in the month of September, 1816, and of which Mr. Maziere was the trustee.

This trust was for a term of twenty-one years, and after payment of the creditors, the ultimate trust was for the benefit of Sir Joseph Hoare. It expired, therefore, in the year 1837, Mr. Maziere dying shortly afterward. The suit was not instituted until the year 1841, four years after the death of the trustee. When instituted, it was very far from being rapidly prosecuted. A decree was made by the Court of Chancery, in Ireland, in the month of May, 1847, but little or nothing was done under that decree. In the month of November, 1852, Sir Joseph Hoare died. The suit was afterward revived by his representative, the present appellant; and the account taken against the representative of the trustee was not, in fact, taken until the years 1856 and 1857.

It is important, in the first place, to observe that although it is perfectly true that no time runs as between the *cestui que trust* or beneficiary and the trustee, upon an express trust, so as to bar the remedy of the beneficiary, yet with respect to claims made by him against a trustee, the general rule of equity that encouragement is not to be given to stale demands, is equally applicable. And in taking an account for the purpose of charging the trustee with personal liability (which is the object of the present suit), every fair allowance ought to be made in favor of the trustee, if it can be shown that the claim which is now sought to be enforced is one which arose many years ago, and one of the nature and

particulars of which the beneficiary was at the time when it arose perfectly cognizant.

Now, that observation will be found applicable to the whole of the subjects of the present complaint. The first and principal object of the appeal on the part of M'Donnell, was to charge the trustee, Mr. Maziere, with certain sums of money which constituted an abatement allowed by him to one of the tenants by the name of Wise, from his rent, and which abatement began to be made as early as the year 1823. It appears that Sir Joseph Hoare had granted a lease for nine thousand years (equivalent to a perpetuity) of certain estate in Ireland, to a person of the name of Wise, reserving a payment, which in reality was in the nature of a fee farm rent, but which rent, contrary to the practice of a fee farm rent, was very nearly equal, if not quite equal, to the rack rent of the land. Difficulties were experienced by the trustee in recovering the amount of this rent from Mr. Wise, and in the year 1823, the trustee made an abatement to Mr. Wise, of forty guineas per annum out of his rent, and in so doing, he acted with the knowledge of Sir Joseph Hoare, to whom the fact was immediately communicated; and he acted also with the entire approbation of Captain Hoare, a relative of Sir Joseph, to whom Sir Joseph Hoare had, on his leaving Ireland, committed (as is proved by his own letters) the entire management and superintendence of the estates in the hands of the trustee. These facts are put beyond possibility of doubt by the correspondence. It appears that the circumstances were fully stated by the trustee, Mr. Maziere, to Sir Joseph Hoare. The fact that Sir Joseph Hoare had committed the superintendence of the estate to Captain Hoare is proved by the correspondence. It is also clearly proved, that Sir Joseph Hoare was aware that Captain Hoare and the trustee had concurred in the propriety of making this abatement, and it is clear that Sir Joseph Hoare, although he certainly grumbled at what had been done, did not attempt, by any means, by any legal proceeding or otherwise, to question the legality or the propriety of what had been done by the trustee.

The Lord Chancellor of Ireland refused, under these circumstances, to charge Mr. Maziere's estate with the amount of this abatement, which was sought to be charged against it upon the ground that he had no right to make the abatement, and that

the sum so abated might have been recovered if due diligence had been used. Having regard to the facts proved, and to the silence of Sir Joseph Hoare upon the subject, I think the fair inference will be that it was a prudent abatement, and one therefore that does not at all form a proper subject of complaint against the trustee. But besides that, I think it clear that it was done under the authority that Sir Joseph had committed to Captain Hoare. It would be infinitely too much for Sir Joseph's representatives to attempt now, to deny that authority which was admitted by Sir Joseph himself, and that in the act so done by his agent Sir Joseph Hoare virtually acquiesced, inasmuch as no proceeding was taken to deny the validity of what had been done until the institution of this suit in May, 1841, about eighteen years after the transaction had occurred. I think, my Lords, upon these two grounds you will have no difficulty in concurring with the Lord Chancellor of Ireland, and in affirming his refusal to charge the trustee with this abatement as an act of willful default (a).

(a) "In the case of a stale claim, barred by lapse of time, by gross laches, and long unexplained acquiescence in the operation of the adverse right, courts of equity will often treat the lapse of a period less than the one specified in the statute of limitations as a presumptive bar to the claim." "If the complainant seeks to avoid the effects of the lapse of time, on the ground of concealed fraud, he must set forth, with particularity, when and by what means the fraud was discovered, and the averments so made must be supported by the proofs," *Badger v. Badger*, 2 Clifford's Reports of District Court U. States (1862), 137.

Walmsley v. Booth, 2 Atk. 25: In 1739, Lord HARDWICKE decided that six years' acquiescence by a deceased party, in a bond given to his attorney, was sufficient to bind a suit by the executor after the death of the testator. In 1741 he reconsidered the same case, and reversed his former decision, holding the acquiescence not sufficient.

Alloway v. Braine, 26 Beavan 575, (1859): Ten and a half years' acquiescence held to bind a party who had bargained for property afterward sold, with notice, to another.

The trustee was also the *cestui que trust*, and although for eight years he acquiesced in a loss of the trust estate, he afterward held the representatives of the trustee responsible, and recovered in the action, *Butler v. Carter*, 5 Eng. Ch. Cases, 276.

Merrivether v. Lewis, 9 B. Mon. 179: Marginal note sustained by the text: "Admissions *in pais* are not conclusive, except where third persons have acted upon them. They can not be denied, in such cases, to the prejudice of third persons."

"If a party having an interest in preventing an act being done, acquiesces in it so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no right to challenge

I pass on now to the consideration of the subject of the cross-appeal, for unfortunately the decree made by the Lord Chancellor of Ireland in this case has been the subject of two appeals. The subject of the cross-appeal arises in this way: There were certain lands in the western part of the county of Cork, called Naskin and Dromerk, included in the trusts of this estate. They were also subject, in respect of the interest of Sir Joseph Hoare, to the claims of other creditors of Sir Joseph, who had not become parties to the trust deed. One of these creditors was a gentleman of the name of Oakley, and he appears in the year 1823 to have instituted a suit in Ireland,—that being a creditor's suit against Sir Joseph Hoare, as also against Peter Maziere, for the purpose of obtaining payment of his debt, and the debts of other creditors similarly circumstanced. In the present suit of *Hoare v. White*, now *M'Donnell and White*, the representatives of Sir Joseph Hoare have brought against Mr. Maziere a charge of willful default in respect of these two estates of Naskin and Dromerk, and the allegation was that rents had become due for three or four years anterior to the month of November, 1823, which rents had not been recovered by Mr. Maziere, but

the act to their prejudice," *Stone v. Wertz*, 3 Bush's Ky. 490, citing 2 Story's Eq. Juris. 756.

Duke of Leeds v. Amherst, 2 Phillips, 116, 22 Eng. Ch., S. C.: The statute rule which gives a remainder-man twenty years, from the time his title accrues in possession, for bringing an action or suit for the property, applies to a claim for compensation for equitable waste as well as to a claim for the land itself; and therefore, an account for equitable waste was decreed against the estate of the tenant for life thirty-eight years after the waste was committed, the title of the plaintiff, as remainder-man, having accrued within twenty years before the filing of the bill. By Lord Chancellor COTTENHAM, p. 122, acquiescence is defined to be: "If a party, having a right, stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he can not afterward complain." *Held*, no acquiescence, because the party was a minor at the time the acts took place. Therefore, "*release, or abandonment of the party's right*," was relied upon. This was a son suing the father's estate, and it appeared some negotiations were had in which this waste in controversy was put forward as a matter for settlement. *Per curiam*: "If that negotiation had been carried forward to a conclusion, and there had been any arrangement of property consequent upon it, the circumstance of the plaintiffs concluding it without bringing forward the claim, might be urged as a release of it. But the negotiation ended in nothing, and can not be held as an abandoning or releasing the claim." In this case, there was evidence going to show that the waste complained of was beneficial to the estate.

might have been recovered by him if due diligence had been used. And accordingly it was sought, in the present suit, to charge Mr. Maziere's estate as for his willful default, to the extent of the rents of those lands not so recovered.

Independently of an objection which I shall presently notice, it certainly does appear from the correspondence, that Sir Joseph Hoare was perfectly aware that lenity and forbearance had been used by the trustee with regard to the tenants of those estates, and in one of the letters of Sir Joseph Hoare, written at the beginning of the year 1823, and before the contemplated visit of Sir Joseph to Ireland, he particularly desires that the agent employed by the trustees should act as gently as possible with regard to the rents of those western tenants, which would include, of course, those estates of Naskin and Dromerk.

It would be very difficult, therefore, I should submit to your Lordships, in the face of that express desire, and after this long lapse of time, to come now to the conclusion that you are at present so perfectly well informed of the facts as to be able to pronounce with satisfaction and confidence, that the circumstances of the country, or the condition of the estates or of the tenantry, did not warrant the forbearance that was exercised by the trustee. But fortunately it is not necessary that your Lordships should found your opinion merely upon that consideration, because it appears that in that suit to which I have already adverted, of *Oakley v. Hoare*, which embraced this matter, an application was made for a receiver in the month of November, 1823. That application appears to have been, at all events, acquiesced in, if not promoted by, Sir Joseph Hoare himself, and he made an affidavit on that occasion, in the month of November, 1823, in which he specifies these arrears as being then due from his tenants, which arrears his representative now seeks to convert into the subject of a charge of willful default on the part of the trustee. In pursuance of that affidavit, an order for a receiver was made in the suit of *Oakley v. Hoare*, and in conformity with the settled law of the Irish Court of Chancery, the duty of the receiver had reference not only to the future rents, but also to all the past arrears of the rent. In effect, therefore, the order appointing the receiver in *Oakley v. Hoare* took away from the trustee of Sir Joseph Hoare, under the deed of 1816,

all further control over those arrears, and all power of collecting them; and that was done with the acquiescence of Sir Joseph Hoare. It was equivalent, therefore, to Sir Joseph Hoare himself having transferred the enforcement of those very arrears from the trustee, of whose contract he complains, to another person; and the trustee consequently can not be held chargeable, seeing that the arrears were treated as rents that were to become payable, and seeing that those rents were to be made the subject of this transfer of ownership from the trustee, Mr. Maziere, to the receiver appointed in *Oakley v. Hoare*.

It appears, however, from the transactions in *Oakley v. Hoare*, that the receiver was no more able to recover the rents than Mr. Maziere had been. But that is a subject into which your Lordships need not enter, as it is sufficient for the present purpose to see that it is impossible to arrive at the conclusion that these rents might have been and ought to have been collected by the trustee anterior to the order appointing the receiver. And even if it had been possible to arrive at that conclusion, it would be impossible to follow that conclusion to its consequences at the present time, in the face of the order by which the arrears were transferred, in the manner I have mentioned, from the trustee, Mr. Maziere, to the receiver appointed in the suit of *Oakley v. Hoare*. But I submit to your Lordships that, in the court below, these considerations were not properly attended to, and that there was a miscarriage therefore, in charging the trustee with the rents of those estates which were due at the time when the order for the receiver was made, and that no such charge ought to have been either allowed by the Master or confirmed by the Lord Chancellor. In that particular, therefore, I should advise your Lordships to reverse the order that has been made, and to strike out of the charge against the trustee the sum of money that has been carried to his debit by reason of this imputation of willful default in respect of the arrears of rent upon those two denominations of land, anterior to the month of November, 1823.

[The remaining parts of the opinion of the Lord Chancellor relate to interest, and the division of the costs in the suit, and are not of sufficient importance to be inserted here.]

LONGEST'S ADMINISTRATOR v. TYLER'S EXECUTOR.

[*This case was decided at the Summer term, 1864, of the Court of Appeals of Kentucky, Justice GEORGE ROBERTSON delivering the opinion. Reported in 1 Duvall, 192.*]

APPEAL FROM LOUISVILLE CHANCERY COURT.

An executor brought suit in equity to subject the land of a debtor of the testator to the payment of the debt. Pending that suit, the land was sold under a decree in favor of the debtor's vendor for a balance of the purchase-money, and the executor bought it. He afterward sold and conveyed the land to a stranger, for more than enough to reimburse what he had paid for it, and to satisfy the debt due his testator. *Held*, that he was bound so to apply the proceeds, but was not bound for the surplus.

The doctrine of constructive fraud operates to prevent infidelity or spoliation in a class of cases embracing executors and other trustees, in which there may be temptations and facilities to rapacity.

It is the duty of trustees to guard, in good faith, the interests of their beneficiaries, and never to speculate on them, or through means afforded by them.

Speed & Smith, for appellant. *G. A. & J. Caldwell*, for appellee.

JUDGE ROBERTSON delivered the opinion of the Court. Levi Tyler, who was executor of C. Longest, deceased, and testamentary guardian of his infant son and only devisee (R. C. Longest), obtained, as executor, two judgments against S. K. Page, for an aggregate amount exceeding \$2,000. Executions on these judgments having been returned no property found, he filed a bill in the Louisville Chancery Court for subjecting to the satisfaction of that entire debt, Page's undivided moiety of 1,200 acres of land, in Hopkins County, Kentucky, to which Page was entitled jointly with one Ayres. Ayres and Page had purchased the land from Coleman, whom Page still owed a balance of about \$2,500 of the price. During the pendency of Tyler's bill a partition between the joint owners allotted to Page 613 acres, and Coleman obtained a decree for selling that allotment for satisfying his unpaid balance. Tyler attended the sale, and bought 595 acres for Coleman's debt, then amounting to \$2,595.70; and afterward, the chancellor having, on Tyler's said bill, ordered a sale of the

residual, 18 acres, in part satisfaction of Page's debt to Longest, Tyler bought that portion also, at the price of \$40—thus buying the whole 613 acres for the sum of \$2,595.70, in 1847-8. In 1852 he resold part of the land for \$5,777, and, in 1856, sold the residue for \$1,625, making the entire proceeds of sale \$7,202.

In 1858, R. C. Woolfolk, administrator of the said R. C. Longest, who, in the mean time, had attained majority and died intestate, brought this suit in the Louisville Chancery Court, asserting an equitable right to the profits made by Tyler by the purchases and sales aforesaid. Tyler, in his answer, resisted the claim, and asserted that he had, in good faith, bought the land for his own benefit, and therefore had appropriated no portion of the proceeds of said land to the use of R. C. Longest on account of the judgments against Page.

The chancellor adjudged to *R. C. Longest's Administrator v. Guthrie*, as Tyler's administrator, the amount due on the judgments Tyler, as executor of C. Longest, had obtained against Page; the whole of which still remains, although Tyler said to two witnesses, in 1852, that he had then saved that debt.

From that judgment each party has appealed.

In revising the case, we shall consider only one question involving the nature and extent of the trust under which Tyler bought the land.

To prevent infidelity or spoliation in a certain class of cases embracing executors and other trustees, in which there may be peculiar temptations and facilities to rapacity, and peculiar difficulty in detecting the wrong, the law has prudently established a jealous and preventive doctrine of constructive fraud. This provident doctrine may be sufficiently illustrated for this case by the following examples:

1. If an executor or other trustee, at a sale of any of the trust property, buy it, the beneficiary shall have the election to hold him to the purchase, or to disregard it and claim restitution of the thing sold or payment of its full value.

2. All profit made by a trustee by the use of any trust property belongs to the beneficiary.

3. If an executor or other trustee pays debts with less than

the nominal amount, he is entitled to reimbursement of what he paid only.

4. If a trustee buy an incumbrance on the beneficiary's property, although he shall have paid his own money, he holds it to the use of the beneficiary at what he gave for it.

5. It is the duty of trustees to guard in good faith the interests of their beneficiaries, and never to speculate on them or through any means afforded by them (a).

A proper application of the comprehensive and conservative principle thus partially illustrated, will decide this case.

The pendency of the suit *in rem* against Page's land, operated as a lien thereon in favor of the complainant Tyler, as executor of C. Longest. As the land was unquestionably more than sufficient for paying Page's debt to Longest, Tyler, even had there been no prior encumbrance, could not have defeated full payment, by buying the land for himself, at a price less than the amount secured by the executorial lien, but would have held the land, so bought, still subject to that lien, or in trust for the deficit. The intervention of Coleman's prior lien did not change the equitable character or effect of his purchase. His extinguishment of that lien inured to the advantage of his lien as executor, but did not discharge that lien, and he still held the land subject to it, so far as the value of the land exceeded the

(a) Trustees buying in claims against the trust estate, can hold them only as security for the amounts paid, with interest, *Quackenboss v. Leonard*, 9 Paige, 344, citing *Lewen on Trusts*, 289.

Green v. White, 1 Johns. Ch. 27, p. 37: The principle is the same as to buying in the trust estate, or buying securities upon it.

A trustee can not act for his own benefit in a contract on the subject of the trust, *Morrett v. Parker*, 2 Atk. 52.

A trustee is not permitted to use the information he gains as trustee, by purchasing in for himself, 3 Atk. 37; 3 P. Williams, 249, note a.

Hawley v. Mancius, 7 Johns. Ch. 189: "A trustee purchased in a judgment against the estate with his own funds. Held, that it must be satisfied, to the extent of the money paid, out of the trust fund, and not otherwise."

"It is a general principle that if a trustee, etc., gets an advantage by being in possession, or behind the back of the party interested, and purchases in an outstanding title, or incumbrance, he shall not use it to his own benefit, and the annoyance of him under whose title he entered, but will be considered as holding in trust," *Morgan's Heirs v. Boone's Heirs*, 4 Mon. 297.

A trustee is not permitted by law to do any thing to the prejudice of the *cestui que trust*, or to acquire title to the trust estate in his individual character, to the injury of the trust, *Morrison v. Caldwell*, 5 Mon. 435.

amount paid for removing Coleman's encumbrance. To that extent his own personal interest and his fiducial duty and interest were conflicting; and, therefore, his purchase must, to the same extent, be deemed a trust. This has been adjudged in the analagous case of *Van Epps v. Van Epps*, 9 Paige's New York Ch. 237. In that case a trustee, in a junior mortgage, purchased for his own benefit and with his own money, at a decretal sale for satisfying the prior mortgage, and the chancellor decided that he held the property in trust for his beneficiary's claim under the junior mortgage, subject to a lien for what he had paid to extinguish the elder mortgage (a).

According to the principle as thus recognized and illustrated, Tyler, having sold and conveyed the land to strangers, had a right to retain of the proceeds as much as he paid; and then, as he sold it for a sum which would satisfy both liens and leave a large surplus, it was his duty to pay, or account for as paid, his judgments against Page. And we can see no consistent reason why the implied trust should be extended any further, or why, consequently, he should be held liable to his beneficiary for a surplus profit made by his own skill and with his own capital, and whereby he secured the trust debt. This was the judgment of the chancellor. We concur in its justice; and, therefore, it is hereby affirmed, and the cross-appeal dismissed.

(a) In *Van Epps v. Van Epps*, 9 Paige's Ch. 241, Chancellor WALWORTH says: "The defendant is also wrong in supposing that he was authorized to become the purchaser of the Greenbush farm, under the master's sale upon the prior mortgage, for his own exclusive benefit, to the prejudice of the subsequent mortgage which he held in trust for others. The rule of equity which prohibits purchases by parties placed in a situation of trust or confidence with reference to the subject of purchase, is not, as the defendant supposes, confined to trustees or others who hold the legal title to the property to be sold; nor is it confined to a particular class of persons, such as guardians, trustees, or solicitors. But it is a rule which applies universally to all who come within its principle; which principle is, that no party can be permitted to purchase an interest in property and hold it for his own benefit, where he has a duty to perform in relation to such property which is inconsistent with the character of a purchase on his own account and for his individual use." The cases on this subject are nearly all referred to in *Hawley v. Cramer*, 4 Cowen, 717, and in the then recent case of *Greenlaw v. King*, decided by Lord COTTENHAM, 5 London Jurist, 18.

For an enumeration of some of the relations to which the rules governing trustees and trusts apply, see note to *Michoud v. Gerod*, preceding, page 48.

FAUCETT v. FAUCETT.

[*This case was decided at the Winter term, 1866, of the Court of Appeals of Kentucky, Chief Justice BELVARD E. PETERS delivering the opinion. Reported in 1 Bush, 511.*]

APPEAL FROM TAYLOR CIRCUIT COURT.

A purchase made by a trustee or guardian of the trust property, or by an executor of the estate of his testator, from himself, during the continuance of the fiduciary character of the purchaser, will not be sanctioned or allowed to prevail, unless it be made under the authority of the court and consent of the persons beneficially entitled to the property, who are competent to consent, and even then it will be regarded with suspicion. Such a purchase, however fair in itself, is voidable at the option of the *cestui que trust*. Nor is it necessary to show that the trustee has made any profit or obtained any advantage by his purchase; but it will be supported if found to be beneficial to the trust estate.

A trustee or executor will not be permitted to create in himself an interest opposite to that of the party for whom he acts, nor to traffic in the estate for his own emolument. This principle applies also to administrators.

W. Howell, for appellant.

CHIEF JUSTICE PETERS delivered the opinion of the Court:

Robert Faucett devised the principal part of his estate, consisting of land and slaves, to his wife, "during her natural life or widowhood," and directed, at her death or marriage, that his land, slaves, and personalty should be sold by his executor, and gave specific directions how the proceeds should be divided among and held by his children. The slaves he directed to be sold to his children only.

He appointed his son, William Faucett, his sole executor, who qualified and took upon himself the execution of the will.

In September, 1862, after the death of the widow, the land, slaves, and personalty were sold publicly to the highest bidder, by the executor, as directed in the will, and William Faucett, the executor, purchased the land at the price of five dollars fifty-one and one-half cents per acre.

On the 21st of January, 1864, this action in equity was instituted by William Faucett against the other devisees and heirs of said testator, alleging the foregoing facts, and also that he had

paid to the several devisees their respective portions of the price for which the land was sold, which they had received without an objection on their part to the manner of the sale, the price at which he purchased the land, or that he was the purchaser; that the sale was a fair, open sale; that there was competition in the bidding; and the land sold for a full, fair price. He makes a copy of the will, the receipts of the devisees to him for their respective parts of the purchase-money, and the deed of Sanders and wife to himself for their interest in the estate, Mrs. Sanders being a daughter and one of the devisees of testator, parts of his petition, and prays that the sale may be confirmed by the Court, and that the devisees and heirs of testator be compelled to convey the land to him.

He furthermore alleges, he did not know at the time he bid, that it was illegal or improper for him to do so; but believed that, as the sale was open and public, and cried by an auctioneer, he had a right to purchase. On final hearing, the petition was dismissed, and it is stated in the judgment that, "the attorney of the defendants consenting thereto, the dismissal is without prejudice;" and to reverse that judgment William Faucett prosecutes this appeal.

The transcript of the record before us shows that process was issued to the counties of Taylor, Casey, and Hart against a part of the defendants, and a warning order taken against those who were proceeded against as non-residents; but it does not appear that there was service of process on the resident defendants, and none answered except the guardian *ad litem* appointed for some of the infants.

There is nothing, therefore, indicating an acquiescence in the sale of the land by those interested, unless it can be inferred from the fact of their reception of the purchase-money, and the additional fact that several of them were present at the sale and made no objection. This latter fact is proved by Cowherds, the auctioneer, and the only witness examined.

Whether or not a court of equity should approve the sale in this case, depends upon facts not fully developed in this record.

The doctrine is indisputably established, that a purchase made by a trustee or guardian of the trust property, or by an executor of the estate of his testator, from himself, during the continuance

of the fiduciary character of the purchaser, will not be sanctioned or allowed to prevail, unless it be made under the authority of the court, or with the full concurrence and consent of the persons beneficially entitled to the property, who are competent to consent; and even then it will be regarded with suspicion.

In the absence of such corroborative circumstances, a purchase of this nature, however fair and honest in itself, is voidable at the option of the *cestai que trust*; nor is it necessary to show that the trustee has made any profit or obtained any advantage by his purchase; but it will be supported if found to be beneficial to the trust estate.

And it is immaterial, in this respect, that the purchase is made at a public sale by auction, or another person as agent for the person standing in the relation of trustee, guardian, executor, etc., *Hill on Trustees*, 158-9, *side page (a)*.

A trustee or executor will not be permitted to create in himself an interest opposite to that of the party for whom he acts, nor to traffic in the estate for his own emolument (and the same principle applies also to administrators), 5 J. C. R. 409; *Meacham's Heirs v. Meacham's Adm'rs*, etc., *Dana*, 260.

None of the beneficiaries under the will are shown to have been before the court, either by actual service of process or by voluntary appearance, as no answer was filed except the one filed by the guardian *ad litem* for the infant defendants; nor does it appear that there was service of summons on the infants; and whether the attorney who consented to the dismissal of the petition represented the non-resident defendants for whom one was appointed or not, we are not informed. But as it is alleged in the petition that the whole of the purchase-money has been

(a) *Campbell v. Walker*, 13 Ves, 601: "The lot was put up to sale by auction. My opinion, formed after great consideration, is that the sale by auction makes no difference. There is no medium of sale that may be made a wider inlet to fraud than sales by auction."

How Trustees may become Purchasers.—The rule governing in cases where trustees desire and purchase with the consent and approval of the court, is fully set out and explained in *Campbell v. Walker*, 5 Ves., Jr., 678. The party petitions to the court and the purchase is made under its supervision.

A case of this kind has but lately passed under the supervision of the Court of Appeals of Kentucky, and was approved by it. It was a case where the sale was to advance the interests of the beneficiaries, and for reinvestment—so stated to, and approved by the court, *Norman v. Norman*, 6 Bush, 496.

actually paid to the persons entitled thereto, and receipts exhibited, and it may turn out, upon further investigation, that the purchase was made by appellant with the concurrence and consent of those beneficially interested, and thereby bring the case within one of the exceptions to the general rule, and as it is, moreover, important for all the parties that the estate should be finally settled and wound up, the court below should, by proper proceedings, and after full preparation, either confirm the sale and order a conveyance, or set aside the same upon equitable principles, and order a resale of the land. All of which could have been done under the prayer for general relief.

Wherefore, the judgment is reversed, and the cause remanded for further proceedings consistent herewith.

CHARLES FOLLANSBE, APPELLANT, v. JAMES P. KILBRETH AND HARVEY DeCAMP, APPELLEES.

[*In the Supreme Court of Illinois, June term, 1856, Associate Justice JOHN D. CATON delivering the opinion. Reported in 17 Illinois, 522.*]

APPEAL FROM COOK COUNTY COURT OF COMMON PLEAS.

When a person purchases property as the agent of another, though he may have the deed or contract of sale made out in his own name, the principal, from the moment of the purchase, acquires an equitable title thereto, subject to all the incidents attaching to such an estate, and the agent holds it in trust for the principal.

An equitable title, derived under such circumstances, may be divested out of the *cestui que trust* otherwise than by alienation, before the trust is actually performed. If the trustee has practised any fraud toward his *cestui que trust*, the latter may, when he discovers the fraud, repudiate the acts and purchase of the trustee, and thus divest himself of his equitable title, or he may waive the fraud and claim his rights as *cestui que trust*; or, before he has discovered the fraud, he may treat the purchase as his own by selling his equitable title. The *cestui que trust* may also divest himself of his equitable title by laches, fraud, or by agreement.

A court of equity will not permit a *cestui que trust* to show a speculative disposition toward his trustee. If a *cestui que trust* discovers facts which would give him a right to repudiate the acts of his trustee, and has investigated them, or had a reasonable time to do so, he is bound to declare whether he will avail himself of the right or not, and can not lie by in a position to affirm the bargain, if a profitable one, and repudiate it if it is a losing one.

Where a *cestui que trust*, having a right to repudiate a transaction, laid by for three years, and suffered his trustee to go on and make payments for the property: *Held*, he was not entitled to relief.

THIS was a bill in chancery, filed February 17, 1854, in the Cook County Court of Common Pleas, by the appellees against the appellant, praying for a decree, declaring the defendant to be a trustee of the complainants of block 57, Canal Trustees, subdivision of sec. 7, T. 39 N., R. 14 E., and for a conveyance, etc. It appeared, that on or about the 7th of November, 1848, the defendant purchased the above block for \$1,500; \$500 of which was paid by a conveyance of eighty acres of land, belonging to the defendant in M'Henry County; \$250 was paid in cash; and the remainder on the 6th of September, 1849, 1850, and 1851. The defendant took from the vendor a bond to himself, for a deed when the deferred payments should be made. The bill sets forth a voluminous correspondence between the parties, showing that the defendant purchased the property as the agent of the complainants and one Person, who had since transferred his interest to them, and that the taking of a bond for a deed to the defendant was contrary to their instructions.

The answer sets forth a further correspondence between the parties, showing that the defendant executed his own bond to the complainants and Person for the conveyance of the property, upon payment of the sum of \$1,500, less \$375 in the defendant's hands, in three annual installments, due on the 1st of September, 1849, 1850, and 1851; and claiming that they had accepted of the relation of vendee of the defendant, and were bound by the term of the contract.

As an excuse for not making the payments at the times when they became due, the complainants alleged that the defendants misrepresented to them the value of the land purchased; and had paid his own land toward the purchase at the nominal sum of \$500, when in truth and in fact, it was only worth \$100 or \$200 at the time. Evidence was introduced to support these allegations.

The other facts in the case sufficiently appear in the statement of them in the opinion of the Court.

C. Beckwith and *A. Huntington*, for appellant. *G. Goodrich*, for appellees.

CATON, J. I agree with the position assumed by the complainants' counsel, that when the true character of the original transaction is fairly understood, the positions of the parties must be considered as that of principals and agent, and that the land was purchased by Follansbe in trust for the complainants, although the purchase was nominally to himself. Nor do I deem it essential to inquire whether their subsequently treating him as their vendor without objection, changed that relation so as to entitle him to insist upon the rights of a vendor instead of a trustee. If he is entitled now to the position of a vendor, there is no pretense for inferring a specific performance against him by reason of the inexcusable *laches* of the purchasers, so that the first bill which was filed with that view was no doubt properly dismissed. We shall, for the present, consider the case, assigning to Follansbe the position of agent and trustee. Considering such to be the case, the complainants acquired an equitable title to the premises the moment the purchase was made, which was at the time subject to all the incidents attaching to such an estate. It is assumed on the part of the complainants that such an interest could not be divested except by alienation. They assert that when a trust once exists it must always continue till it is performed. In this they are undoubtedly mistaken, as may be shown by the very case made in this bill. Admitting the fraud which is charged against Follansbe, and they have undoubtedly a right to repudiate his acts in purchasing the land and taking the bond for a title to himself, and compel him to assume all the responsibilities of a purchaser, or they might waive the fraud and claim their rights as *cestuis que trust*. Or they might, before they discovered the fraud, considering themselves bound by the acts of their agent, treat the purchase as their own, and sell their equitable title, which would undoubtedly be a valid sale. Or, not having sold, they might, when they discovered the fraud, abandon it on account of the fraud. By adopting the latter course, they would, no doubt, divest themselves of that equitable title to which they had a right to assert a claim, and which was actually vested in them till the time of such renunciation. In this case, then, they would become divested of an equitable title in or right to the land, without any alienation. These rights must be reciprocal when circumstances are so changed as to leave an option of election in

the trustee, whether he will recognize further the existence of an equitable title in the *cestuis que trust*, as, where they may have been guilty of a fraud in inducing the trustee to act for them and incur personal responsibilities which he would not have undertaken but for the fraud practiced upon him. Such a case of fraud might, no doubt be supposed on the part of the principals as would justify him in repudiating the agency, and thus, without their consent, would the principals be divested of their equitable estate, which till then would have existed, and which would have continued to exist had the agent chosen to have recognized it.

Again, such equitable estate might, no doubt, be destroyed by the mutual agreement of both parties, without fraud on either side. Nor am I prepared to say that such an estate might not be defeated by *laches*, or subsequent misconduct on the part of the principals or *cestuis que trust*.

Let us address ourselves to the case in hand and apply these principles to the facts before us.

The complainants resided in Ohio, and the defendant in Chicago, where the premises in question are situated. In November 1848, the defendant, as the agent, and for the benefit of the complainants, purchased the property in his own name, for fifteen hundred dollars, of which he paid five hundred in a lot of land which he owned in M'Henry County, and two hundred and fifty in money, and gave his obligation to pay the balance in one, two and three years, with six per cent interest. The purchase was approved by the complainants, who received a certified copy of a bond for a deed to themselves from the defendant, which had been executed and recorded, and miscarried in the mail. The bond obligated the defendant to convey the land to the complainants upon their paying to him the fifteen hundred dollars, one-fourth down, and the balance in three equal annual installments. No objection was then made or subsequently, till this bill was filed, that the defendant originally purchased the land in his own name instead of the complainants. At the time of Follansbe's purchase he had in his hands three hundred and seventy-five dollars of the money of the complainants for the purpose of investment in land, which was sufficient to pay the first installment. Before the second payment fell due, Follansbe wrote to the complainants to put him in funds to meet it, which they neg-

lected to do. This payment fell due on the 1st of September, 1849. Up to this time, their correspondence shows that the complainants felt perfectly satisfied with the purchase and with the course of the defendant in relation to it, but it is quite apparent that as they resided at a distance, they derived their information in relation to the value of the land solely from Follansbe, and placed implicit confidence in his integrity and representations. In the latter part of September, 1849, Kilbreth, one of the complainants, visited Chicago, and examined the premises, and made inquiries as to their value, and for the first time, expressed dissatisfaction with the purchase; and shortly after, on the 24th of November, Person, another of the purchasers, wrote to the defendant accusing him of fraud in misrepresenting the value of the land, and offering to take it at one thousand dollars. To this the defendant replied, vindicating himself, but I confess, without satisfactorily explaining the representations he had made as to the value of the land, and the prices at which contiguous land had been sold. The defendant concluded that letter in these words: "Now, all I ask of you is to remit me the payment on this purchase now due, or forever hereafter hold your peace." To this letter no answer appears to have been given, nor was the money remitted as requested, but the defendant was left to pay the purchase-money with his own funds.

When Kilbreth, one of the complainants, was in Chicago, in September, 1849, after the second payment fell due, he employed Mr. Rees, a land agent in Chicago, to examine the title, and with him examine the land. At this time, he appears to have been dissatisfied with the purchase. And he then told Rees that he did not intend to make any further payments on the property, or under contract, or on the bond, to Follansbe (in his various examinations he uses all three expressions), unless the land should increase considerably in value. He left Chicago without making any payment to the defendant, or putting him in funds with which to make the payment, then overdue, on the original purchase. Nor did they put Follansbe in funds, or make the subsequent payments as they fell due. Nor do they appear to have taken any further notice of the purchase, or to have done any thing in relation to it subsequent to the correspondence above referred to, till nearly three years after, and after the time for making the

last payment had expired. In October, 1852, they appeared and tendered to the defendant the amount due on the bond which he had given them for a conveyance.

We can not hesitate to say that here was a clear abandonment of whatever rights they had in the purchase made by the defendant for them as their agent or trustee. They had an undoubted right to a reasonable time to investigate the conduct of their agent; and, if they found he had practiced a fraud upon them, to repudiate the purchase, and make him assume its responsibility; but, in doing so, they must necessarily relinquish to him its benefits. For this there was an abundance of time prior to the maturity of the second payment. They did make such investigation, and condemned his conduct, and refused to go on with the purchase. This is apparent, from the fact that they refused to put him in funds or make the payment then due, and from the letter which Person wrote to him in the November following, in which they not only decline to go on with the purchase upon the original terms, but propose a new arrangement, and to take it at one-third less; but above all is their intention apparent not to hold themselves bound by the purchase in the declarations made by Kilbreth to Rees, at the time he was in Chicago, in September, 1849, in which he declared they would make no more payments unless the land rose considerably in value. Now, this declaration shows unequivocally an intention to speculate on the chances of an enhancement in the value of the land. He made no complaint of a want of information on the subject, and no doubt or objection to the title; but the value of the property was the only point involved in his consideration of the subject. On this point there can be no doubt he fully informed himself, and upon the value, as it then stood, he chose not to go on with the purchase, reserving to himself, if he might do so, the right to reserve the benefits of it, should it subsequently rise in value, so as to make it a good speculation. This speculative disposition is as repulsive to a court of equity, in *cestui que trust*, toward his trustee, as in a purchaser toward his vendor. The one is as much bound to deal fairly as the other. The law must prohibit the one as much as the other from speculating upon chances or future events. Granting to complainants the right to repudiate this purchase, and throw it upon the

hands of the defendant for any cause, he had a right to know whether they would avail themselves of that right, so soon as they discovered the facts which conferred upon them that right, and had investigated, or had a reasonable time to investigate, the facts by which their election to affirm or disaffirm his acts was to be controlled. They had no right to hold him in suspense while they could take the chances of the fluctuations in the value of the land. An attempt was made upon the argument, which is also apparent in the examination of Rees, to avoid the effect of his testimony, by insisting that Kilbreth did not intend to repudiate the original purchase made by Follansbe for them, as their trustee, but that he had reference solely to the purchase they had apparently made of him, by accepting his bond for a deed; but this distinction will not bear the scrutiny of an impartial examination. It is very apparent that Kilbreth, at the time, had no such distinction in his mind, but that his declarations were made in reference to the whole transaction, and to whatever right they had in it; and that he intended to make no further payments toward the land, in any way, unless it should rise in value. Unless such rise should take place, he intended to throw the land, and all consequent responsibilities, upon Follansbe. Had he intended to abandon any rights under the bond, and to insist that the original purchase was made for their benefit, he would undoubtedly have so explained himself at the time.

This distinction must be looked upon as an after-thought. Nor will it do to say that Kilbreth was ignorant of the law, and did not know that he had a right to claim that the original purchase was made in trust for them, and that Follansbe was only their trustee, and, hence, not knowing it, he could not assist their rights against him in that capacity. Knowing the facts, he was bound to know the law, and the defendant was no more bound to wait three years, for them to learn what were their legal rights, than he was bound to wait to see whether the property would rise in value or not. During that time Follansbe was bound to meet the payments upon the land, and he had a right to know whether he was making those payments for himself or for them, and whether he had a right to dispose of the land in the mean time, to protect himself, should an opportunity offer.

But it was said that the complainants had not yet been able to learn whether the title which Follansbe had purchased was good or not, and that they had a right to know what the title was, before they decided whether to avail themselves of the benefits of the purchase or not. Whether this be so or not, it is very certain that the question of title had no influence on the minds of the complainants in determining on the propriety of the purchase. No doubt or question seems to have arisen on that point. Had any arisen, and the records were not satisfactory, the most natural and proper inquiry would have been of the defendant, had he really desired to have his doubts solved, who could have given him a satisfactory explanation at once. No such inquiry seems to have been made, and we are constrained to the conclusion that his conduct was not controlled in the least degree by any question as to the title. If it was, then he acted unfairly, by not applying to the defendant, and giving him an opportunity of satisfying him on the subject. It is evident that this question of title was also an after-thought.

Even after all that Kilbreth did in September, when in Chicago, and after Person's letter in November following, evincing a settled disposition not to be bound by the purchase in any way, or to make any further payments on it, Follansbe wrote them, giving them still an opportunity of reconsidering the matter, and completing the purchase, and admonishing them that if they still persisted in refusing to do so, he should acquiesce in their election to throw the purchase upon his hands, and to assume it on his own account; and still expressing the opinion that it would turn out an advantageous operation. Such is the effect of the defendant's last letter to Person. To this letter no answer appears ever to have been made, and no funds were sent. If what had previously transpired was not conclusive upon the complainants, as an abandonment of the purchase, their profound silence for nearly three years after this correspondence must surely be construed into an acquiescence in the proposition of the defendant, that they would hold their peace. The defendant had a right so to understand their silence. Unless we can say that they had a right to lie by indefinitely, to see if property would not rise in value, so as to make the purchase a speculation, and if it should fall in the market, to throw the loss on the defendant, and if it

should rise, to claim the advance as their own, we must conclude, from all that took place, that they abandoned the purchase. Unless the defendant was deprived of all rights to protect himself, unless they could compel him to make all the payments and run all the risks, and then, after waiting as long as they chose, adopt or reject his acts as subsequent events might dictate, they must be held to have abandoned the purchase. Admitting that Follansbe had paid too high a price for the land, fraudulently and for his own advantage, as charged in the bill, there was still some limit to the extent of their rights; nor was he deprived of all his. The greatest malefactor has rights, which courts of justice will protect; and the defendant, admitting the truth of all that is charged against him, is not in a worse condition. He was not entirely at the mercy of the complainants. They were bound in a reasonable time, to decide definitely whether they would adopt or repudiate his acts; and, having decided, they were bound by it. They could not, after having charged the defendant with fraud, and, in consequence thereof, repudiated his acts, and refused to advance the money to meet the payments, leaving him to make them, come in, after three years' silence and acquiescence, and revive their claim, and seize upon a speculation which, in the mean time, had become inviting by a rise in the property, which they did not anticipate, or of which, at least, they wanted confidence. If, when Kilbreth was in Chicago, in September, 1849, they intended to repudiate the relation of vendor and vendee, as between themselves and the defendant, and to assert that of trustee and *cestuis que trust*, justice and equity required that he should then have declared his intention, and have met the responsibilities of the position thus assumed, by paying the money due from them on the purchase. But they avowed no such intention, nor did they evince any by their conduct. If they kept silence when equity required them to speak, they can not be allowed to speak when equity requires them to keep silence. This is an old maxim, and applicable to the case before us. We think the complainants have not made out a case for the relief prayed, and that the bill should have been dismissed. For convenience, I have treated the case as if Person had not sold out to his associates, and was one of the complainants, as it could make no difference in the result.

The decree must be reversed and the bill dismissed. DECREE REVERSED (a).

(a) See as to confirmation or ratification, the preceding case herein, *Hoffman Coal Company v. Cumberland Coal Company*, page 87, and especially the valuable note thereto, on page 98. Also, notes to authorities on ACQUIESCENCE, pp. 38, 72.

After giving several cases wherein defenses of the nature indicated by these terms have been held not to bar the action, it is highly proper that some should be furnished wherein they have been sustained. The foregoing, as well as that of *Wade v. Pettibone*, 11 Ohio, 57 (which follows), have been selected as fair adjudications sustaining the doctrine of election or ratification. In each case, the parties appear to have stood upon an equality. The requisites to constitute a binding confirmation existed, as laid down by Lewin on Trusts (see note aforesaid, p. 98): "1. The confirming party must be *sui juris*, and not laboring under any disability, as infancy or coverture;" and after full information, the *cestuis que trust* having freely and intelligently elected to take their course, the courts respectively and properly held that they were bound by such election. The characteristic brevity and terseness of Judge LANE is noticeable in the case taken from the Ohio Reports.

These two cases will be found to differ materially from that of *Jones v. Smith*, 33 Mississippi, 215, also given hereinafter. This case is reprinted—not as an authority, but the better to illustrate the true rule in the premises, by producing all that can be said in behalf of an erroneous and not well-considered judgment.

On the other hand, reference is here made to a case which recognizes the equitable rights of the trustee, and treats him with the same regard for justice that is required at his hands.

Dale v. Hamilton, 22 English Chancery, 266: "A and B, for whom land had been purchased by C, with a view to its being resold in building lots, on the land being conveyed to them, signed a paper writing purporting to be a memorandum of agreement between them relative to the land, by which it was agreed 'that they should each advance half the purchase-money and receive interest on the same at five per cent, and that they were to have each one-third interest in the purchase, and to reserve one-third of the profits arising therefrom for C, in lieu of his commission for purchasing, selling, surveying, valuing, and laying out the land in lots, or any other services that may be required of him; but that it was clearly and distinctly understood that C should have no power or authority whatsoever over the land, and that he should not be entitled to receive any compensation therefrom until the whole was sold and paid for.' The land having afterward greatly increased in value, A and B refused to recognize C's interest in the speculation, and offered him a money compensation for his services, whereupon C, who had objected from the first to the clause in the memorandum which excluded him from all control, as inconsistent with the original terms for which he had verbally stipulated, filed his bill for an immediate sale of the land. And the court, being of opinion that the defendants, by repudiating the trust as to C's share, had devolved upon the court the discretion which they had by the memorandum reserved exclusively to themselves, as to the time of sale, declared C entitled to one-third, and referred it to the master to inquire whether it would be for the benefit of all parties that the land should be sold."

M. S. WADE v. M. D. PETTIBONE.

[*This case was decided in the Supreme Court of the State of Ohio, at its December term, 1841, Chief Justice EBENEZER LANE delivering the opinion. Reported in 11 Ohio, 57.*]

The creditor in an execution may claim the benefit of a purchase made by his attorney, especially if the whole debt is not paid. But he must assert his right in a reasonable time.

THIS is a bill in chancery, from the county of Delaware.

In 1835, the Miami Exporting Company, having been, for many years, a suspended institution, and being about to recommence business, made certain dispositions of their then existing debts, for the benefit of their old stockholders. By a resolution of the 13th of July, 1835, they divided their debts into classes, rating them after the probability of making collections; and, on the fourth class, which they called "*desperate*," they authorized their agent to retain, as a compensation, fifty per centum on the amount collected. They appointed the plaintiff their agent, and authorized the president to convey to him, in *trust* for the stockholders, all the property, of every description, owned by the institution.

Some time in 1835 or 1836, the plaintiff employed the defendant, who is a solicitor in chancery, to bring a suit to foreclose a mortgage, in Delaware County, against the heirs of James Keys, one-third of which belonged to the Bank of the United States, and the two-thirds to the Miami Exporting Company. The suit was duly prosecuted, and the land advertised for sale, on the 3d day of October, 1836.

On the 7th of September, 1836, about four weeks before the sale, Pettibone wrote a letter to Wade, advising him that the land had been appraised by the master, and of the time of sale, and inquiring if he should bid it in for the company, if it should sell for less than the appraisement. No answer to this letter was received, at the time of the sale, and Pettibone attended, and bid it in, in his own name. On the 11th of October, eight days after the purchase, Wade wrote to Pettibone instructions to purchase the property.

On the 29th of November, 1836, Pettibone again wrote to Wade, reciting the sale and his purchase; as he inferred, from his receiving no answer to his letter, that the company did not wish to purchase; but that, since his letter had been mislaid, he was now willing to relinquish his purchase to the company, and would release when he acquired a title from the master. He offered, however, to take it at the appraisement, and if they deemed it best to retain it, he would convey all his interest, as soon as he got his deed.

On the 9th of December, Wade replied to this proposition, that Pettibone might retain the land at \$2 per acre, and if he did not accept it on these terms, he directed the deed to be made to M. S. Wade, trustee, and agent of the Miami Exporting Company.

Pettibone, on the 27th of December, by another letter, renewed his offer to purchase; to pay \$1,200, on certain payments, and repeating, if these terms were not accepted, to forward to Wade a deed, if he preferred it, on the return of the master.

Wade answered this letter on the 10th of April; declines setting a price upon the land, until he sees it, and expects "*to be up*" (to Delaware) some time in May, and offers the preference to Pettibone, if he concludes to sell.

No further communication was had between these parties, until August, 1839, a period of two years and four months. In the Spring of 1839, the master pressed Pettibone for adjustment of the purchase-money. In June, 1839, Pettibone visited Cincinnati, the residence of the plaintiff, and he says, in his answer, he sought him, and could not find him. He then paid into the office of the company the purchase-money, \$650.89, after deducting the master's costs and his own fees, and, thenceforth, claimed the land as his own.

Powell, for the plaintiff. *Finch*, for defendant.

LANE, C. J. The ground upon which the defendant claims the right to withdraw his offer to relinquish his title to the land, is because, he says, that offer was made *to the company*, but that he has discovered Wade claims the title, as his own, and not for the benefit of the company. Much of the argument is devoted

to the examination of the proofs bearing on this point. It will be unnecessary for us to notice this, because, in our opinion, the case will be decided upon principles among which this loses its character and importance.

Pursuing the facts, in the order of their occurrence, the first proposition to be considered is, whether the attorney or solicitor can purchase, at a sale under the execution, which his client is seeking to enforce; as, between him and the debtor, as between him and third persons, such sale is without objection; but it is another question, between him and his client, when the law creates confidential relations. The attorney is retained for the purpose of doing all in his power to advance the client's interests, and, especially, that the property should produce enough, by sale, to pay the whole debt. For this purpose, although not the agent of the law, in making sales, he has a large control as to the management of the execution. Without adverting to other means of influence, he can select his time to set the machinery of the law in motion, and he can countermand, or postpone it, for the purpose of obtaining, for his client, a better price. But, if he were permitted to purchase, it would be his interest to buy at the least price; his personal interest, therefore, would be adverse to that of his client, especially if the property did not produce enough to pay the whole debt. He would be enabled to gain, by sacrificing his client's interest, and the lower the price, the greater would be his advantage, and the greater his client's loss. To prevent this collision of interests—to destroy the temptation of abusing opportunities, for obtaining personal advantages, at the expense of confidential obligations, by sacrificing interests which he is bound to protect—the law imposes upon those who stand in fiduciary relations the disability of acquiring interests inconsistent with such relation. It does not inquire whether the act was honest or advantageous, but gives the protected party all advantages of the act done. This doctrine is universally applicable to trustees, executors, agents; and it nowhere is of more forcible application, than to an attorney, purchasing under an execution, where the whole debt is not paid, 8 Ohio, 552; 9 Ohio, 117; 5 Watts, 303.

The case, then, is one in which, although Pettibone acted in

entire good faith, his clients may step in, and claim the benefit of his purchase, unless it was made with their assent. He claims that assent may be inferred, after they did not answer the letter in which he communicated information about the sale, and asked their instructions. We do not intend to determine whether such assent can be presumed from this omission. And it is of no consequence, in the present case, because, by his letter of the 29th of November, he cheerfully relinquished all benefit of the purchase to the company. This act was a recognition of his confidential relations; and it authorized the company, or Wade, their trustee (whom, on this examination, we, at present, regard as identical with the company), to demand of Pettibone, to hold his rights for their benefit, and to be substituted in his place. Negotiations were then opened between the parties for the sale of the land, which continued until April, 1837, when Wade signified his intention to be in Delaware, to mature the arrangement, during the ensuing month. Up to this time, the rights of the parties were clear; and had an application been then made, we should have found no difficulty of entertaining a suit to give the title to the plaintiff.

But, before Wade, or the company, could claim the benefit of this purchase, it is plain, they must absolve Pettibone from his responsibilities, and pay the expenses of acquiring the title. Pettibone had a claim for his own fees. He was responsible to the master, for the expenses of the sale, and he stood liable to the master for the immediate adjustment of the purchase-money; for, although Wade might elect to assume the purchase, it is not clear that Pettibone could, even then, compel them to take it, and certainly not without litigation, in which the master ought not to be involved. In this stage of the case, Pettibone had a right to expect from the plaintiff an early close of the affair.

Instead of this, not a step was taken, or a movement made, toward the completion of the purchase, from April, 1837, to June, 1839. During this period of twenty-five months, no effort was made, either to pay to Pettibone his just claim, or to release him from his responsibilities to the master. And if we may trust the answer, when, in the Spring of 1839, the master had exacted, from Pettibone, security for the prompt payment of the purchase-money, and when Pettibone visited Cincinnati,

in June, 1839, on this errand, the plaintiff could not be found. He, therefore, paid the money over to the company.

The phase, therefore, which the case assumes, is not as to the existence of the original right, but whether it has not been lost by delay. This long slumber—this unaccountable and inexcusable neglect of duties—seems, to the Court, a sufficient answer to a plaintiff who is seeking, in chancery, to assert rights. BILL DISMISSED.

CHAMBERLAYNE JONES, *et ux.*, v. WILLIAM B. SMITH, *et al.*

[This case was decided in the High Court of Errors and Appeals of the State of Mississippi, at the April term, 1857, Associate Justice ALEX. H. HANDY delivering the opinion. Reported in 33 Mississippi, 215.]

A trustee may purchase from the *cestui que trust* the trust estate; but such a transaction will be regarded with suspicion, and criticised with the utmost rigor; and, if attacked by the *cestui que trust*, it is incumbent on the trustee to show that it was fair and just in all respects, and consummated on his part with the most abundant good faith, and that the *cestui que trust* had all the information in relation to the trust estate possessed by the trustee. See 1 Lead. Cas. in Eq. 125.

When the trustee has been guilty of no positive act of fraud in a purchase made by him from the *cestui que trust* of the trust estate, the latter will lose his right to annul the agreement, for want of the *uberima fides* required of trustees in such transactions, if he fail to take steps to set aside the contract in a reasonable time after its consummation. In such a case, the unreasonable delay will be held to be a ratification of the sale by the *cestui que trust*, *Scott v. Freeland*, 7 Smede and Marshall, 419.

The failure of the *cestui que trust* to take steps to set aside a sale made by him to the trustee of his trust estate, for three years and eight months, is unreasonable, where the trustee has not been guilty of any positive act of fraud or concealment.

A rescission of a contract will not be decreed at the instance of a party guilty of negligence and unreasonable delay in asserting his rights, and when from a change of circumstances the parties can not be restored to the same situation they occupied before the contract was made. See *Johnson v. Jones*, 13 S. and M. 583.

APPEAL from the District Chancery Court of Holly Springs, Hon. JAMES F. TROTTER, Vice-Chancellor.

The substance of the pleadings is fully set out in the opinion of the Court.

W. L. Sharkey and H. W. Walter, for appellants. *Clayton and Watson*, and *Clapp and Strickland*, for appellees.

HANDY, J., delivered the opinion of the Court. This was a bill in chancery, filed by the appellants, for the purpose of setting aside an agreement, made between the appellant's wife and the defendant Smith, under which the defendants claim title to certain personal and real estate.

The allegations of the bill are, in substance, that the appellant's wife had been the wife of one S. W. Lewelling, who died in Memphis, Tennessee, in February, 1851, leaving a will, by which he gave all his property to his wife after the payment of his debts, and appointed the defendant Cheairs his executor; which will was probated in Tennessee, and Cheairs became administrator there of the estate, jointly with one Craddock; that the appellants were married in November, 1853; that Lewelling was much embarrassed, and in June, 1850, executed a deed of trust to secure certain debts, amounting to the sum of \$23,489, and consisting of promissory notes, payable in one, two, three, and four years, and, to indemnify the sureties on these notes, conveying a tract of land and about forty slaves, in this state, to the defendant Smith, as trustee, with power of sale upon default in the payment of any one of the notes, either for the amount of the note then due and unpaid, or for the full amount of the indebtedness, at the option of a majority of the creditors; and if all the notes should be paid without sale, that the property should revert to Lewelling and his wife; that the debts secured were partnership debts of the firm of Woods & Lewelling, and that the property conveyed was worth at the time \$33,000, and is now worth \$38,000 or \$40,000; and that the value of the crops raised on the plantation, from 1850 to 1854, inclusive, has been about \$4,000 per annum; that assets belonging to Woods & Lewelling, amounting to about \$30,000, had come to the hands of the defendants, Smith and Cheairs, who had used them in paying the debts of the firm of Woods & Lewelling, which amounted to but little besides the debts secured in the trust deed; that after the dissolution of that firm, Lewelling continued to do business in Memphis, and after his death, that assets, amounting to several thousand dollars. came to the hands

of Cheairs, but none into the hands of Craddock, his co-administrator; that soon after Lewelling's death, his widow took up her residence at Cheairs's house, on his invitation, and she afterward proposed to go to the plantation of her deceased husband, and stay with the family of the overseer, but that Cheairs would not consent to it; that during the time she resided at his house, he gave her no information as to the condition of the estate, and made a secret arrangement, without her knowledge, with Smith, to purchase the entire interest which she had in her husband's estate, for a mere pittance; that she was approached by persons under the influence of Smith and Cheairs, who persuaded her to sell her interest to them, upon false representations, to which she finally yielded, being destitute and without counsel, and under these circumstances, that she signed a conveyance of her interest, for the joint benefit of Smith and Cheairs, who have since divided the property amongst them, and are now in possession of all the property belonging to the estate of Lewelling; that before his death, Lewelling had purchased a lot in Memphis, on which was due a balance of \$2,000, and that Smith and Cheairs, or Smith alone, agreed to pay that balance, and have the lot conveyed to her, which was accordingly done; that the section of land conveyed by the trust deed was worth \$6,400, and that she was entitled to dower therein, never having relinquished it, and that her dower was worth more than what she received for her interest in the whole estate; that her interest in the estate was worth \$20,000 or \$30,000, of which she had been defrauded by the defendants; that Smith had advertised the tract of land and some of the slaves for sale, under the trust deed, but that there was no necessity for such sale, as the debts secured by the deed had all been paid from other sources; and prays that the sale be enjoined.

The bill charges, that the consideration paid for the widow's interest in her husband's estate, was grossly inadequate; that she was contracting with those who held the property in a fiduciary capacity for her benefit, and the contract was a fraud, both in law and in fact, Smith and Cheairs being fully conversant with the value of the property, and she being ignorant of its value; that the defendants have refused a bonus at one time

of \$5,000, and at another, of \$6,000, upon their purchase. The bill offers to pay any debts due the defendants, or the creditors of the estate, and take the property and effects, prays an account, and that the conveyance to the defendants be set aside.

The answer of Smith admits his appointment as trustee in the deed, and states that at the time of Lewelling's death, the debts thereby secured were wholly unpaid; that the contract with the widow was made by him on the 14th of June, 1851, and two of the notes secured were to fall due in four days thereafter, and there was no money to meet them except some proceeds of the cotton crop of 1850, and the creditors were pressing; that there was little hope of indulgence, and no hope of meeting the debts, but by a sale of the property; that under these circumstances, a person named Webb, who had been the clerk of Woods and Lewelling, and had been employed by the administrators of Lewelling to make collections, came to respondent's house, in company with Cheairs, and made the proposition to respondent to purchase; he having been engaged for some months in collecting, and had not collected enough to pay his wages and expenses, which facts he had previously reported to the widow, and had furnished her with a statement of the condition of the estate, and had advised her to sell her interest, all of which was done without the respondent's knowledge; that respondent replied to Webb, that he would not make the purchase until she had consulted some friend; and upon this being made known to her, she desired him to request a person named French to call and see her, which he did; that he was afterward informed by French of her intention to sell, of the amount she required, and of her request that respondent would meet her at a specified place; that the meeting took place, and the contract was made upon the terms proposed by herself, after consulting with her friends, without any persuasion either by French or respondent, the act being entirely voluntary on her part; that the contract was entered into with respondent alone, Cheairs not having taken part in it until some days after its completion; that afterward, when the agreement was about to be consummated, by conveying the lot to her, he told her, that if she was not entirely satisfied, he was willing to let it all drop, and she expressed herself entirely satisfied, and the agreement was then consummated. He insists that

the price paid for the property was fully its value, under the circumstances; and that, besides the trust debts, he and his co-defendant have paid some seven or eight thousand dollars more than was collected from the assets of the estate, making about \$31,430 paid by them for the property; that the settlement of Cheairs with the proper court in Tennessee, of his administration, shows that he is in advance to the estate, \$3,808; and that in a suit between Cheairs and Woods, the partner of Lewelling, for a settlement of the partnership, it appears that Cheairs, as administrator of Lewelling, had paid out for debts and expenses, \$15,380 more than he had collected of the assets of the firm. He admits the advertisement of the land and some of the slaves, for sale, under the deed of trust, but states that the object of it was merely to pass the title to the property by sale under the trust deed. He admits that the debts of Lewelling have been paid, or assumed by himself and Cheairs, and that Craddock offered him a premium of \$3,000 for his interest in the purchase, which he declined. He states that the house and lot, conveyed as the consideration for the purchase of the widow's interest, was sold by her and her present husband, the appellants, for the sum of \$5,000, which took place in September, 1854, and relies on the statute of limitations as a defense.

The answer of Cheairs is to the same effect as that of Smith.

An amended bill was afterward filed, attempting to charge the defendants with large assets, besides those embraced in the trust deed, arising from the firms in Memphis, in which Lewelling was a partner, denying that the settlement of Cheairs as administrator in Tennessee was binding upon the appellants, or that they were affected by the settlement in the chancery suit, not being parties to those proceedings; alleging that the widow was absent from this state after the contract was made, and ignorant of the fraud practiced upon her, and that this suit was commenced as soon as the fraud was discovered, and charging that there was a tract of land in Virginia, worth \$2,000, of which she had no knowledge, and of which the defendants were aware at the time of sale, and have since received rents.

The answers of the defendants deny the material parts of the amended bill, and as to the land in Virginia, state that they knew nothing of it except what was derived from a letter shown to

Cheairs by the appellant's wife, shortly after Lewelling's death, are ignorant of its value or extent, and have not sold or rented it, nor receive any rent for it.

Upon the final hearing, the bill was dismissed; and from that decree the complainants took this appeal.

The first position taken in support of the bill is, that the purchase having been made by the trustee from the *cestui que trust*, must be set aside, as of course, upon the motion and at the option of the *cestui que trust*, however fairly it may have been made.

The rule that purchases of the trust property by trustees at their own sales, may be set aside as of course, at the election of the *cestui que trust*, and a resale ordered, is sanctioned by many authorities. But this right does not exist to the same extent in cases of purchases by the trustee directly from the *cestui que trust* as when the purchase is made by the trustee at his own sale. In such cases the rule is, that the trustee is not under an absolute disability to make the purchase; but that it will be regarded with suspicion, and that it is incumbent on the trustee to show that it was in all respects just and fair, and with the most abundant good faith on his part, and the fullest deliberation upon the part of the *cestui que trust*, with the aid of all the information possessed by the trustee touching the subject, and which it was his duty to communicate. 1 Lead. Cases in Eq. 125; and the numerous cases in the notes, 150.

It is next insisted that, under the rule thus stated, this sale can not stand, because the defendants have not only failed to show that fairness and good faith which are required, but the evidence shows a positive advantage taken of the *cestui que trust* by the trustees in making the purchase. The circumstances relied upon as showing that an undue advantage was taken of the widow in the transaction are, her destitute and distressed condition, her ignorance of the state of her husband's affairs, complicated as they were, and of the value of his property and means, and even the amount of his property; the failure of Smith, who was trustee under the trust deed in which she was interested, and of Cheairs, who was administrator of the estate of which she was residuary legatee, to obtain and impart full and accurate information as to the condition of the estate, if indeed, they were not

actually apprised that it was of much greater value than the amount of the debts agreed to be paid by Smith in making the purchase ; and lastly, the inadequacy of the consideration paid, to the real value of the interest in the property conveyed.

Upon these points many witnesses were examined, and the testimony is very voluminous. But the particulars principally relied upon as showing that a fraud was practised in procuring the sale are, the circumstances under which the widow of Lewelling was advised to make the sale, the fact that Smith and Cheairs were both interested in the transaction, though conducted in the name of Smith alone, and that they were aware that they were making a speculation at the time.

There appears to be nothing in the evidence in relation to the means employed to induce Mrs. Lewelling to make the sale, to justify the charge that it was the result of fraudulent representations, or that there was a combination for such a purpose between Smith and Cheairs. It was first proposed to her by Webb, who stood indifferent between the parties, and who was intimately acquainted with the affairs of the estate, having been clerk for Lewelling in his life-time, and having been engaged for several months before the sale in collecting the debts due to the estate. He had previously furnished her with a statement of the condition of the estate, and now, upon full conference with her, advised her to sell if she could get \$5,000 for her interest, believing that her interest was not worth more than that sum. She was at first disinclined to sell, but changed her mind upon his representations, and desired him to request French to call and see her. He did so, and she consulted with French as her friend, and he advised her to sell, as Webb had done. Webb first mentioned the subject to Smith of his own accord, who declined making the purchase unless she was advised to sell by some friend, and stated, that if it was proposed to him after such consultation, he would consider it. After consultation with French, she authorized him to propose the sale to Smith, which he did, and it was accordingly made by him for her. Some time after this, and when the agreement was about to be consummated, Smith stated to her that she might abandon it, unless she was entirely satisfied with it ; and desired her to consult her friends upon the subject. She replied that she was entirely satisfied, stating that it might

be doubtful whether, after the lapse of several years, she would get any thing, after settling up the liabilities of the estate.

In addition to the probability that but little of the estate would be left after paying the debts, as was the opinion of Webb and French, who were well acquainted with its condition, there was strong reason to believe, that the property would have to be sold under the trust deed for the notes secured thereby, and which were about falling due when the sale was made; and she was anxious that the property, which consisted mostly of family slaves, should not be sold and separated. She therefore preferred that they should be sold together to Smith, and thereby prevented from being "scattered," by being sold under the trust deed, which appeared to be inevitable, unless the arrangement with Smith had been effected; and this appears to have been a controlling motive with her in disposing of her interest and making the arrangement with Smith.

It is true that the evidence justifies the belief that Smith and Cheairs were both interested in the purchase when it was made, and that, for some reason, which does not sufficiently appear, the name of Cheairs did not appear in it. But it does not appear, that any influence or undue means was exerted by either of them to induce her to make the arrangement, or that they had a better knowledge of the condition of the estate than Webb, who had been so intimately connected with it, or that they refused to give her such information upon the subject as they possessed.

There is much testimony with respect to the value of the property and assets of the estate, and considerable disagreement between the witnesses for the respective parties as to the value of the slaves in the trust deed and the choses in action of the estate. The estimated value relied upon by each party appears to be sustained by the witnesses examined by them respectively; and under such a state of disagreement of witnesses, we can not say that the court below erred in adopting the valuation proved by the witnesses for the defendants, who are not only unimpeached, but are shown to have had opportunities to form reliable opinions upon the subject.

But there is a circumstance shown by the testimony, tending to cast suspicion upon the purchase of the defendants, with reference to the value of the interest of Mrs. Lewelling in the estate.

It is proved that shortly after the arrangement was made, Smith stated that he had made a trade with Mrs. Lewelling by which he and Cheairs would clear \$10,000. He also declined an offer made him by Craddock, shortly after the trade, of \$3,000 for a third interest in it. He also refused an offer of \$5,000 for the bargain, made by another person shortly after the trade.

It is true that these facts would not of themselves be sufficient generally to set aside a contract on the ground of gross inadequacy of price, nor would they be sufficient to show fraud in procuring the sale. The hazard of taking the property, and, as a consideration, undertaking to pay all the debts of the estate, might be a risk which would justify the purchase of the widow's interest in the estate, if the relation of trustee and *cestui que trust* had not existed between them, for there would, in such case, be no such evidence of fraud, and no such gross inadequacy of consideration as to vitiate and annul the contract. But when the relation of trustee and *cestui que trust* exists between the parties, it is the duty of the trustee to show that he gave all the information in his possession to the *cestui que trust*, and that he took no advantage whatever of his superior knowledge in relation to the value of the estate; and unless all suspicion against the openness and fairness of his conduct be removed, the sale will be vacated at the election of the *cestui que trust*. Although, in this case, the value of the purchase, as acknowledged by Smith, may have been based upon a calculation of the prospective profits to be derived from the use of his capital and industry to be employed upon the property, yet, under the stringent rule applicable to cases of this nature, his acknowledgments as to the value of the purchase would tend strongly to show that the consideration paid was greatly less than what he believed its value at the time; and we should be inclined to hold, that on this ground, the sale can not be sustained, if there was nothing else in the case to show, that upon principles of equity it should not be set aside. This brings us to consider the only other point which we deem it necessary to notice (a).

(a) Thus far no objection can be taken to the rulings of the court. They are in full harmony with those of the recognized authorities on the points considered.

It is expressly stated in the report, that the statute of limitation was plead by the defendants. On reference to the laws of Mississippi (edition of 1839, page

It appears that no step was taken by the appellants to disaffirm the contract until this bill was filed, which was not done until the lapse of three years and about eight months, after the date of the purchase. And in September, 1854, more than three years after the contract was made, the appellants sold the house and lot in Memphis, conveyed by Smith to Mrs. Lewelling, to a third person for the sum of \$5,000.

It has been held by this Court, that the *cestui que trust*, in cases of this character, may elect to treat the sale as valid, and that such election will be implied from any unreasonable delay in

556), it is found that actions for the recovery of real estate must be brought within twenty years, and "*actions on the case*," other than slander, shall be brought within six years. As equity follows the law, where the statute is plead, those periods of times, respectively, would govern. There was no provision in the statute, at that time, similar to the one now common, limiting *actions for relief on the ground of fraud* to five or six years, and, consequently, this case came within the provision of the twenty-year rule, so far as the real estate was concerned, and the six-year rule as to the personality. See the authorities following.

But the court does not base its decision upon the statute of limitation barring the suit, but upon an *implied* confirmation by lapse of time, and from the other circumstances of the case. The widowhood of Mrs. Jones did not protect her from the ruling of the statute, but she was entitled to know from the executors of her husband's estate, the correct condition of its affairs, and if, under improper, however honest, advice, she makes a hasty or improvident bargain, she is entitled to have that beneficent rule of equity applied to her case, that such transactions will be presumed to be fraudulent, and she, like the heir coming of full age, be entitled to relief on applying to a court of equity within a reasonable time, to wit: the periods limiting similar actions at law.

Ashhurst's Appeal, 60 Penn. 290. (See cases cited by the court on p. 315.) This was a suit for *personalty*, decided in 1869. On p. 316, the opinion of the court is stated on the point of acquiescence, and decided in favor of defendants by analogy to the statute of limitations of six years. [Purdon's Digest of Laws of Pennsylvania, 655, sec. 16, provides that *actions on the case* (other than slander, etc.) for *account, detinue, debt*, etc., shall be brought in six years.] Judge STRONG p. 316: "For myself, I think that where a party claims to hold another a trustee of personal property under a constructive trust, he must assert the claim within six years from the time the trust is alleged to have originated, *in analogy to the statute of limitations*." In this case, the suit was brought seven years and near four months after the cause of action arose.

Clegg v. Edmondson, 8 De Gex, M'Naughton & Gordon, 787. This case, also, decided for defendants on the point of *acquiescence*: the suit was for a share of the *profits of coal-mines*, and admitted defendants were constructive trustees; the suit was brought nine years after cause of action arose. (P. 814.)

Jordan v. Morney, 5 H. L. C, 185: "Where a party possesses a legal right, a court of equity will not interfere to restrain him from enforcing it, though, between the time of its creation and that of his attempt to enforce it, he has made representations of his intention to abandon it. Nor will equity interfere even though

taking steps to set it aside. *Scott v. Freeland*, 7 Smede and Marshall, 419. In that case, the delay of an heir for about one year after his majority, to institute his suit to set aside a sale, made by the trustee to himself during the heir's minority, was held sufficient to prejudice his right, and the sale was not set aside upon his application. In this case, the delay was much greater. For ought that appears, the facts relied upon to show that an undue advantage was taken of the widow, might have been ascertained at any time after the sale, by proper investigation and vigilance. She remained a widow until November,

the parties to whom these representations were made have acted on them, and have, in full belief in them, entered into irrevocable arrangements. To raise an equity in such case, there must be a misrepresentation of existing facts, and not of mere intention."

Hawley v. Cramer, 4 Cowan, 734 (1835). A suit in equity arising between creditors. One party alleged that the other got more than their shares, and held such interest as trustees. This view was sustained by the court. "The shortest period which a court of equity is bound to consider an absolute bar to a suit respecting real estate, in analogy to the limitation of actions at law, is twenty years." In cases of implied trusts, relating to personal property, or to the rents and profits of real estate, where persons claiming in their own right are turned into trustees, by implication, the right in equity will be considered barred in six years. Lapse of time was set up as a defense, and held that a *few days longer* would have barred, as the six years would have run out from the time the action accrued.

The case of *Buller v. Haskell*, 4 Dessaus. (S. C.), 702, contains a thorough examination and citation of authorities on the question of confirmation. From p. 708, where it is said "deeds of confirmation" were taken by defendant from plaintiffs, to p. 715, numerous cases are cited where *confirmation* or *acquiescence* were disallowed for various reasons not good in equity. This suit was brought eleven years after the original cause of action arose. In 1804 the first contract was signed for ten per cent on the estate for services; and on making inquiries, the defendant bought the right of the heirs. The other agreement for sale was made the same year. The suit was sustained.

The only possible difficulty in granting the relief prayed for in *Jones v. Smith*, arises from the fact of the plaintiffs having disposed of the house and lot conveyed by defendant Smith to Mrs. Jones—thus rendering it impossible to put Smith in the same condition he was before his purchase of the trust estate. But this difficult point is not at all considered by Judge HANDY; and passing it over, bases his decision upon the erroneous rule of confirmation. However difficult it may have been, a court of equity can always shape its decrees so as to do substantial justice in the premises; and if Smith could not have been reinstated as before his speculation in the trust fund, surely his co-defendant, Cheairs, could have been. As to him, there could not have been any objection to relief on this score.

See as to CONFIRMATION, *Hoffman Coal Company v. Cumberland Company*, preceding p. 96, and note (a) on p. 98. Also, notes to *Follansbe v. Kilbreth*, preceding page 189. Also, notes to pages 38 and 72 preceding.

1853, resting under the advice given by her friends, French and Webb, under which she had acted. If her forlorn condition during that interval, could constitute a sufficient excuse for her want of diligence, that reason ceased upon her marriage to the appellant Jones, after which there was no excuse for want of diligence, in inquiring into the transaction and asserting their rights. Yet there was no effort made to investigate the matter until about twelve months after the marriage, and this suit was not brought until the lapse of about fifteen months after that time. During all this time, no act on the part of the defendants is shown calculated to prevent inquiry, or to lull the appellants into security, or to conceal the true nature of the transaction. On the contrary, they appear to have declared openly their views of the transaction, inasmuch that these declarations, which appear to have been fully and frequently made, are the strongest circumstances turned to their prejudice. Under such circumstances, the failure of the appellants to prosecute their rights for so great a length of time, must preclude them from impeaching the sale, and amount in law to a ratification of it, *Scott v. Free-land*, 7 S. and M. 419; *Ayres v. Mitchell*, 3 Ib. 683.

There may be circumstances of gross fraud and imposition, which would form an exception to this rule, and justify the court in holding that, under the peculiar circumstances of fraud and oppression, the guilty party was entitled to no indulgence. But there is no evidence to bring this case within such a rule, no proof of positive fraud or undue influence practiced by the defendants upon Mrs. Lewelling; the sale appears to have been freely and voluntarily made by her, not through the influence or solicitations of the defendants, but under the advice of her own friends, and upon her own proposition; and entered into by the defendants as a speculation, in which they took the hazard, and from which they expected by diligence to realize a handsome profit.

We think, therefore, that the case comes fully within the rule stated in *Johnson v. Jones*, 13 Smede and Marshall, 583,—that if the party seeking to rescind has been negligent, and there has been a change of circumstances in any material particulars, a rescission should not be decreed.

And under this view of the case, the decree is correct, and must be affirmed.

THE TRUSTEES OF THE M'INTIRE POOR-SCHOOL v. THE ZANESVILLE CANAL AND MANUFACTURING COMPANY, *et al* (a).

[*This case was decided in the Supreme Court of Ohio, at the December term, 1839, EBENEZER LANE, Chief Justice, REUBEN WOOD, PETER HITCHCOCK, and FREDERICK GRIMKE, Judges, the Chief Justice delivering the opinion. Reported in 9 Ohio, 203.*]

A bequest for charitable uses, where the objects are sufficiently defined, and the person designated as trustee acquires a capacity to hold by subsequent act of incorporation, takes effect as an executory devise.

(a) The report occupies eighty-seven pages of printed matter. At the time of its decision it was considered a noted case, and since has been referred to as the leading authority on the points of law and equity passed upon therein. The facts upon which the questions arose are shortly these: On the 18th of March, 1815, John M'Intire, of Zanesville, by his will, after devising certain of his personal property to his wife, authorizes his executors to sell the remainder, and all his real estate (except that situate in Zane's Grant, which was to be sold by them after his wife's death), and to vest the proceeds in stock of the Zanesville Canal and Manufacturing Company, and to pay his wife annually during her life half the profits of all his estate, real and personal. On the death of his wife, the executors are to sell his remaining real estate, except his mansion-house, and vest the proceeds in the same stock. He next devises to his daughter (his only child) his mansion-house, after the death of his wife, in fee simple, provided she leaves an heir of her body, and to her and the heirs of her body, all the rents, issues, interest, and profits of the stock, to be paid to her annually during her life, by the president and directors of the company. The will then proceeds as follows: "But should my daughter, Amelia M'Intire, otherwise called Amelia Messer, die without an heir or heirs of her body, then my house and lot, with the premises, as before described, are to be held in fee simple by the company before described, for the use and occupancy of the president of said company, he paying into the fund aforesaid, for the use hereinafter described, a reasonable rent, to be fixed by the directors of the same; and the president and directors of said company are annually forever to appropriate all the profits, issues, and rents of my stock, as aforesaid, and all my estate of whatever kind the same may be, for the use and support of a poor-school, which they are to establish in the town of Zanesville for the use of the poor children of said town; the children who are to be the object of this institution are to be fixed upon by the president and directors of said company." The testator died in July, 1815, and his daughter Amelia died in December, 1820, without issue. His widow, who was amply provided for by the will, intermarried with David Young, in August, 1816. They interpose this plea, claiming that the charity is invalid by reason of there being no competent trustee designated by the testator, and that Mrs. Young is entitled to the fund intended for the charity, as heir at law of the testator. The plea does not show, nor does it anywhere appear in the case, how Mrs. Young is heir at law.

The modes by which a private corporation in our country is dissolved, are, 1. By the death of its members; 2. Surrender of its franchises; and 3. A judgment of forfeiture for non-use or abuse.

A legislative act reciting that a corporation trustee had *lost its rights*, and authorizing a purchase for the state of its property, is a recognition of its existence as a corporation capable of contracting.

BILL IN CHANCERY. From Muskingum. The plaintiffs, Peter Mills and others, claiming to be the lawful trustees of a charitable fund created by the will of John M'Intire, bring this bill against the Zanesville Canal and Manufacturing Company, the executors of M'Intire, and D. Young and wife, late the widow of M'Intire, who hold or claim the estate, for an account. The case comes on upon a demurrer and answer of the Canal Company, and of the executors of M'Intire, and on a plea by the other defendants. Young and wife deny the validity of the bequest, and set up a right to the estate as heirs. The Canal Company and the executors hold under the trust, and assert that its execution was committed to them by the will, and that it has been thus far faithfully administered.

In 1812, an act was passed to enable John M'Intire and his associates to erect a dam over the Muskingum River, 10 O. L. 173. The preamble recites as the objects, "that great advantages for water-works would be secured, and the navigation of the river improved." The law authorizes M'Intire and his associates to construct the dam in certain specified forms, cut a canal, and build a lock adapted to the passage of boats; to collect tolls; to condemn any adjoining land which they may "find necessary for the purpose of making said canal, or any part thereof, the better to answer the objects of this act" and it renders them liable to the suit of any person injured by their neglect.

In 1824, the association called the Zanesville Canal and Manufacturing Company was formed under this act, with provision for a capital of \$250,000, divided into shares of \$500 each, and prescribing the manner of conducting the business of the company. One hundred and eighty-six shares of stock were subscribed, of which eighty-eight were held by M'Intire in his own right. The company was organized under these articles of association; officers were appointed, and business commenced and continued to improve the navigation of the Mus-

kingum River between Dresden and its mouth. By the 27th section of the act of incorporation, the time for the company to complete their dam, lock, and canal, was extended until the 11th day of February, 1835, and upon their failure, within this extended period, the Muskingum Navigation Company were authorized to finish, take possession of the work, and hold it, until the money expended, and the interest accruing upon it, with ten per cent in addition, should be repaid from its profits. The dam, lock, and canal, were not completed within the time extended by the last cited section; and such forfeiture was incurred, by this failure, as it was intended to impose. On the 19th of February, 1835, a law was passed "authorizing the canal commissioners to take possession of certain property for the use of the State," 33 O. L. L. 90. After reciting that the Zanesville Canal and Manufacturing Company had lost its rights to construct the canal and locks, by non-execution within time, it provides for the purchase from them of the real estate necessary for the dam, canal, and the profitable use of the water, by the State, and for the ratification of existing laws. In the event of inability to make the purchase, it authorizes the canal commissioners to enter and take possession of the land necessary for the canal, locks, dam, and profitable use of the water-power.

In March, 1836, an act was passed by the Legislature of Ohio, "to incorporate the M'Intire Poor-school." After reciting that property had been devised for this purpose, to be managed by the Zanesville Canal and Manufacturing Company, as trustees, and that it had been represented that that company had ceased to exist, so that no persons are competent to execute the trusts, it creates a corporation of five trustees, and confers the necessary powers to carry the devise into effect: "Provided, that nothing contained in this act shall be so construed as to affect the private or corporate rights of any person or persons, or change the will of the said John M'Intire; but, on the contrary, to carry into effect the true intent and meaning thereof."

The Zanesville Canal and Manufacturing Company, organized under the articles of 1812, and accepting the charter of 1816, has in fact continued an organized and existing corporation until this time, managing its own and the M'Intire property, and exercising its corporate functions.

The plaintiffs are the corporation created by the act of 1836, and they bring this bill as well against the Zanesville Canal and Manufacturing Company, as against the executors and the heirs of M'Intire, to ascertain and declare the trust, and to carry it into effect. A demurrer to the bill having been overruled, the case stands for hearing in this Court, upon the demurrer of the Zanesville Canal and Manufacturing Company, and of the executors of M'Intire, contesting the plaintiffs' right to the account upon answers by the same showing the due performance of duties, and furnishing the materials for an account, if the property is demandable by these plaintiffs, and upon the plea of Young and wife, denying the validity of the trust, and claiming the property as heirs of M'Intire.

Henry Stanbery, for complainants. *C. B. Goddard* and *C. C. Converse*, for the Zanesville Canal and Manufacturing Company and the Executors of M'Intire. *Thomas Ewing* and *R. Stillwell*, for Young and wife.

By the Court, *LANE, C. J.*: The plaintiffs' right to relief in the present case, depends upon their successfully maintaining the two following propositions, to wit: that the will of M'Intire created a charitable trust, which this Court can enforce, and that they are the lawful trustees. The first of these arises upon the plea of the heirs, the second is presented by the demurrers and answers of the other defendants.

We have entered upon the examination of this case with much solicitude; for the great value of the property, the very talented efforts of counsel, and the consideration that this is the first proper charity that has fallen under the action of this Court, all unite to magnify its importance. The positions taken by the heirs to show the bequest void, are, 1. That the object of the testator's bounty are uncertain, and that the trustees had no capacity to take, because the Zanesville Canal and Manufacturing Company had no existence as a corporation at the time of making and probate of the will; 2. That its corporate powers have been so forfeited as to terminate its existence; 3. That the bequest to the officers of the company vests the estate in them, in that character, since they hold by an annual tenure, and are liable to be changed at each successive election.

It is admitted, that such a bequest as this would be sustained in England. However uncertain the object; whether the person to take be *in esse* or not; whether the bequest can be carried into exact execution or not; whether the general charitable intention is clearly manifested,—a court of equity will sustain the legacy, and give effect to it in some form upon principles of its own. But it is asserted by the counsel for the heirs, that this lax and wide-reaching jurisdiction in charities is peculiar to England, and depends on the statute of Elizabeth only. We would not unnecessarily enter into the much-disputed and greatly perplexed inquiry of the extent of chancery jurisdiction over charities, independent of the statute. But one of the earliest elements of every social community upon its lawgivers, at the dawn of its civilization, is adequate protection to its property, and institutions which subserve public uses, or are devoted to its elevation, or consecrated to its religious culture, and its sepulchers; and in a proper case, the courts of our State might be driven into the recognition of some principle analogous to that contained in the statute of Elizabeth, as a necessary element of our jurisprudence, 2 Story Eq. 389; 17 Serg. and Raw. 88; 9 Cowan, 437. But without reference to these considerations, where a trust is plainly defined, and a trustee exists capable of holding the property and executing the trust, it has never been doubted that chancery has jurisdiction over it, by its own inherent authority, not derived from the statute, nor resulting from its functions as *parens patriæ*.

The property devised in this case, consisted of land, personality, and stock in the Zanesville Manufacturing Company; the legal ownership of this was either in M'Intire's executor or heir. The condition on which the devise ever took effect, was the death of the daughter without issue. The objects of the testator's bounty were the poor children of Zanesville, and the benefit intended was their education. There is no doubt that a trust attached to the property, whoever might hold it; "for whenever a person by will gives property, and points out the object, the property, and the way it should go, a trust is created." And a bequest of land to A to construct an asylum for aged sailors, although inefficacious to pass the legal title, sufficiently defines the trust, and charges the heir with its performance, 3 Peters,

119, 152; 1 Story Eq. 415; 4 Wheaton, Appendix. The position, therefore, taken by the heirs in the plea, that the land descended to them on the death of the daughter, absolved from the trust, is not supported, but overruled.

The interests of the heirs are nevertheless involved in the case, for the next question arising is, whether the trusts which we have thus found to exist shall be executed by the plaintiffs, who are the trustees under the act of 1836, or the Zanesville Canal and Manufacturing Company, who are the trustees designed by the testator, or upon the heirs upon whom the law throws the duty, if there are no other trustees. In the statement and arguments made by counsel, it seems to be assumed that the Zanesville Canal and Manufacturing Company had no legal existence until 1816. I am not certain this conclusion is just. In 1812, a statute enabled M'Intire and his associates to build a dam across the Muskingum, and cut a canal around the falls. The objects expressed in the preamble are the advantages of water-works, and the improvement of the navigation. It authorizes them to acquire lands, for the purpose of making a canal, "*or the better to answer the objects of this act,*" and it gives the right of suit to any person injured by their neglect. The statute therefore imposes a common liability, and it implies the possession of common property, and the duty of accounting for profits. The organization of the Zanesville Canal and Manufacturing Company was had in 1814, in the form of a corporation. Now, the bare grant "*to hold Gildam mercatoriam,*" a mercantile meeting, has been taken to carry corporate power, on account of common expenditures, 10 Co. R. 30; 1 Roll. Ab. 513—so a grant of land, to a town on rent, and other similar cases, Ang. and A. on Corp. 45. So the grant to a part of an ecclesiastical society, to repair their meeting-house, confers corporate powers, 2 Day Conn. R. 259. It might therefore, perhaps, be plausibly contended that it was a legal existing corporation, before the date of the will, and the objection of their want of capacity to execute trusts might receive its answer, by the notification arising from the subsequent act of the Legislature.

We do not, however, intend to place our decision upon this basis. The actual situation of the company, in 1815, was that

of a corporation *de facto*, with officers, and a capital stock of two hundred and fifty thousand dollars, held in the form of shares. It was in reference to this condition, that M'Intire made a disposition of its property. We have seen that it consisted of his mansion-house, lands, personalty, and stock. It passed to the company for the purposes of this trust, not by the death of M'Intire, but by a contingency which happened in 1820, and after the statute of 1816, which imposed upon them the most ample capacity for holding it. The bequest upon this trust can take effect upon the very common ground as a remainder, contingent upon the death of M'Intire, because limited to a person not in being, but becoming vested by the capacity acquired by the corporation, before the determination of the particular estate. And we should be justified in taking still stronger ground by the authority of a majority of the judges in the *Sailors' Snug Harbor*, 3 Peters 99, in holding that a bequest upon charitable uses may take effect, as an executory devise, to a corporation subsequently acquiring the capacity to hold. It is, therefore, without difficulty we conclude that, on the decease of the daughter, the property of M'Intire passed to the Zanesville Canal and Manufacturing Company upon these trusts.

It only remains to inquire if their right to it has been lost, either by their own neglect, or by subsequent legislation. The act of 1836 was passed upon the supposed case, that this company had become extinct. It carefully saves the rights of all persons in the property, consequently the company lost none of its interests, if it then had a legal existence. If the corporation has been dissolved, it is not through judicial action, but by the bare and naked effect of the statute limiting the time for the completion of the dam and canal. It must be observed, that it is not the 15th section of the statute of 1816 which works this forfeiture, since the time there given is extended in January, 1817, for one year, 15 O. L. 35, and in December, 1817, until December, 1818, 21 O. L. 53; and in 1828 is enlarged until the 11th of February, 1835. The last act, 26 O. L. 57, 5, 26, 27, instead of declaring all rights, privileges, and immunities determined, in case of failure, like the statute of 1816, only provides that the Muskingum Navigation Company may *finish* the canal, and hold it until their expenditures are reimbursed.

There is no forfeiture attached to the last enlarging statute, except what arises from mere lapse of time. No further legislative act works a forfeiture, except that resulting from the act of 1835, which recites that the Zanesville Canal and Manufacturing Company have lost "*its right to construct the work,*" and authorises the canal commissioners to purchase from them. Now, the modes by which a private corporation in our country is dissolved are, 1. By the death of its members; 2. Surrender of its franchises; 3. A judgment of forfeiture for non-user or abuse. But the Zanesville Canal and Manufacturing Company has continued an organized and existing body, until the present day; there has been no judicial act declaring a forfeiture, and the Legislature, by the act of 19th of February, 1835, after the time of its supposed dissolution, recognized it as a person capable of contracting, by authorizing a purchase from it, 33 O. L. L. 90. It seems, then, plain to us, that at the time of the passage of the statute of 1836, the Zanesville Canal and Manufacturing Company had not "*ceased to exist,*" and that their corporate rights to execute the will of M'Intire, through their officers, according to his true meaning, was not affected nor impaired; consequently the incorporation of the new Board of Trustees was void by the terms of the act.

The suggestion that the bill may be sustained at the suit of these plaintiffs, as the representatives of *cestuis que trust*, can not be supported. This Court would entertain a suit for mismanagement brought by the prosecuting attorney, 36 O. L. 35, sec. 43, or upon the relation of a party in interest; but such a proceeding would require a bill of a structure altogether different from this. BILL DISMISSED (a).

(a) In the subsequent case of *The Zanesville Canal and Manufacturing Company v. The City of Zanesville*, 20 Ohio, 483, it was held that the gift of John M'Intire, the subject of litigation in both these cases, to charitable uses, is to receive the most liberal construction. Consequently, that the M'Intire fund, given to establish "a school in the town of Zanesville, for the poor children in said town," is not limited in its benefits to the children of parents residing in that locality which constituted the town corporate of Zanesville at the decease of the testator; but that the charity will be administered for the benefit of poor children in the town of Zanesville, according to the most general and popular sense of the term.

FRANCOIS FENELON VIDAL, JOHN F. GIRARD, AND OTHERS,
CITIZENS AND SUBJECTS OF THE MONARCHY OF FRANCE, AND
HENRY STUMP, COMPLAINANTS AND APPELLANTS, v. THE
MAYOR, ALDERMEN, AND CITIZENS OF PHILADELPHIA, THE
EXECUTORS OF STEPHEN GIRARD AND OTHERS, DEFENDANTS.

[THE GIRARD WILL CASE.]

[Decided at the January term, 1844, of the Supreme Court of the United States, Associate Justice JOSEPH STORY delivering the unanimous opinion of the Court. The Court was then constituted as shown on page 18 preceding. Reported in 2 Howard, 127.]

The corporation of the city of Philadelphia has power, under its charter, to take real and personal estate by deed, and also by devise, inasmuch as the act of 32 and 34 Henry VIII, which excepts corporations from taking by devise, is not in force in Pennsylvania.

Where a corporation has this power, it may also take and hold property in trust in the same manner and to the same extent that a private person may do if the trust be repugnant to, or inconsistent with, the proper purpose for which the corporation was created, it may not be compellable to execute it, but the trust (if otherwise unexceptionable) will not be void, and a court of equity will appoint a new trustee to enforce and perfect the objects of the trust.

Neither is there any positive objection, in point of law, to a corporation taking property upon a trust not strictly within the scope of the direct purposes of its institution, but collateral to them.

Under the general power "for the suppression of vice and immorality, the advancement of the public health and order, and the promotion of trade, industry and happiness," the corporation may execute any trust germane to those objects.

The charter of the city invests the corporation with power and rights to take property upon trust for charitable purposes, which are not otherwise obnoxious to legal animadversion.

The two acts of March and April, 1832, passed by the Legislature of Pennsylvania are a legislative interpretation of the charter of Philadelphia, and would be sufficient hereafter to estop the Legislature from contesting the competency of the corporation to take the property and execute the trusts.

If the trusts were in themselves valid, but the corporation incompetent to execute them, the heirs of the deviser could not take advantage of such inability; it could only be done by the State in its sovereign capacity, by a *quo warranto*, or other proper judicial proceeding.

The trusts mentioned in the will of Stephen Girard are of an eleemosynary nature and charitable uses, in a judicial sense. Donations for the establishment of colleges, schools, and seminaries of learning, and especially such as are for the education of orphans and poor scholars, are charities in the sense of the common law.

The decision of the Supreme Court of Pennsylvania, in the case of *Zimmerman v. Andres* (January term, 1844), recognized and confirmed, viz: "That the conservative provisions of the statute of 43 Elizabeth, chap. 4, have been in force in Pennsylvania, by common usage and constitutional recognition, and not only these but the more extensive range of charitable uses which chancery supported before that statute and beyond it."

The present case distinguished from the case of the *Trustees of the Philadelphia Baptist Association v. Hart's Executors*, 1 Wheaton 1, upon two grounds, viz: 1. That the case in Wheaton arose under the law of Virginia, in which state the statute of 43 Elizabeth, chap. 4, had been expressly and entirely abolished by the Legislature, so that no aid whatever could be derived from its provision to sustain the bequest. 2. That the donees were an unincorporated association which had no legal capacity to take and hold the donation in succession for the purposes of the trust, and the beneficiaries were also uncertain and indefinite.

The decisions and *dicta* of English judges, and the recent publication of the Record Commissioners, in England, examined as to the jurisdiction of chancery over charitable devises anterior to the statute of 43 Elizabeth. This part of the common law was in force in Pennsylvania, although no court having equity powers now exists or has existed capable of enforcing such trusts.

The exclusion of all ecclesiastics, missionaries and ministers of any sort from holding or exercising any station or duty in a college, or even visiting the same, or the limitation of the instruction to be given to the scholars, to pure morality, general benevolence, a love of truth, sobriety, and industry, are not so derogatory and hostile to the Christian religion as to make a devise for the foundation of such a college void, according to the Constitution and laws of Pennsylvania.

THIS case came up by appeal from the Circuit Court of the United States, sitting as a court of equity, for the Eastern District of Pennsylvania.

The object of the bill filed in the court below was to set aside a part of the will of the late Stephen Girard, under the following circumstances: Girard, a native of France, was born about the middle of the last century. Shortly before the declaration of independence, he came to the United States, and before the peace of 1783, was a resident of the city of Philadelphia, where he died in December, 1831, a widower and without issue. Besides some real estate of small value, near Bordeaux, he was, at his death, the owner of real estate in this country which had cost him upward of \$1,700,000, and of personal property, worth not less than \$5,000,000. His nearest collateral relations were, a brother, one of the original complainants; a niece, the other complainant, who was the only issue of a deceased sister; and three nieces, who were defendants, the daughters of a deceased brother. The will

of Mr. Girard, with two codicils, was proved at Philadelphia, on the 31st of December, 1831.

Jones and Webster, for the appellants, who were also the complainants below. *Binney and Sargeant*, for the defendants.

Mr. Justice STORY delivered the opinion of the Court: This cause has been argued with great learning and ability. Many topics have been discussed in the arguments, as illustrative of the principal grounds of controversy, with elaborate care, upon which however, in the view which we have taken of the merits of the cause, it is not necessary for us to express any opinion, nor even to allude to their bearing or application. We shall, therefore, confine ourselves to the exposition of those questions and principles which, in our judgment, dispose of the whole matters in litigation; so far, at least, as they are proper for the final adjudication of the present suit.

The late Stephen Girard, by his will, dated the 25th day of December, A. D. 1830, after making sundry bequests to his relatives and friends, to the city of New Orleans, and to certain specified charities, proceeded, in the twentieth clause of that will, to make the following bequest, on which the present controversy mainly hinges:

"XX. And whereas I have for a long time been impressed with the importance of educating the poor, and of placing them, by the early cultivation of their minds and the development of their moral principles, above the many temptations to which, through poverty and ignorance, they are exposed; and I am particularly desirous to provide for such a number of poor male white orphan children as can be trained in one institution, a better education, as well as a more comfortable maintenance, than they usually receive from the application of the public funds; and whereas, together with the object just adverted to, I have sincerely at heart the welfare of the city of Philadelphia, and as a part of it, am desirous to improve the neighborhood of the river Delaware, so that the health of the citizens may be promoted and preserved, and that the eastern part of the city may be made to correspond better with the interior,—now, I give, devise and bequeath all the residue and remainder of my real and personal estate of every sort and kind wheresoever situate (the real estate in Pennsylvania charged aforesaid,) unto 'the mayor, aldermen, and citizens of Philadelphia,' their successors and assigns, in trust, to and for the several uses, intents and purposes hereinafter mentioned and declared of and concerning the same, that is to say: So far as regards my real estate in Pennsylvania, in trust, that no part thereof shall ever be sold or alienated by the said mayor, aldermen, and citizens of Philadelphia, or their successors, but the same shall forever thereafter be let from time to time, to good tenants, at yearly or other rents, and upon leases in possession not exceeding

five years from the commencement thereof, and that the rents, issues, and profits arising therefrom shall be applied toward keeping that part of said real estate situate in the city and liberties of Philadelphia constantly in good repair (parts elsewhere situate to be kept in repair by the tenants thereof respectively), and toward improving the same, whenever necessary, by erecting new buildings and that the net residue (after paying the several annuities herein before provided for) be applied to the same uses and purposes as are herein declared of and concerning the residue of my personal estate; and so far as regards my real estate in Kentucky, now under the care of Messrs. Triplett and Brumley, in trust, to sell and dispose of the same, whenever it may be expedient to do so, and to apply the proceeds of such sale to the same uses and purposes as are herein declared of and concerning the residue of my personal estate.

"XXI. And as far as regards the residue of my personal estate, in trust, as to two millions of dollars, part thereof, to apply and expend so much of that sum as may be necessary, in erecting, as soon as practically may be, in the center of my square of ground between High and Chestnut Streets, and Eleventh and Twelfth Streets, in the city of Philadelphia (*a*), (which square of ground I hereby devote for the purposes hereinafter stated, and for no other, forever,) a permanent college, with suitable out-buildings, sufficiently spacious for the residence and accommodation of at least three hundred scholars, and the requisite teachers and other persons necessary in such an institution as I direct to be established, and in supplying the said college and out-buildings with decent and suitable furniture, as well as books and all things needful to carry into effect my general design."

The testator then proceeded to give a minute detail of the plan and structure of the college, and certain rules and regulations for the due management and government thereof, and the studies to be pursued therein, comprehending reading, writing, grammar, arithmetic, geography, navigation, surveying, practical mathematics, astronomy, natural, chemical, and experimental philosophy, the French and Spanish languages (not forbidding, but not recommending the Greek and Latin languages), "and such other learning and science as the capacities of the several scholars may merit or warrant." He then added, "I would have them taught facts and things, rather than words or signs; and especially I desire that by every proper means a pure attachment to our republican institutions, and to the sacred rights of conscience, as guaranteed by our happy constitutions, shall be formed and fostered in the minds of the scholars."

The persons who are to receive the benefits of the institution, he declared to be "poor white male orphans, between the ages of six and ten years; and no orphan should be admitted

(*a*) It will be seen hereinafter, that by a codicil he selected another site for "Girard College," upon which latter location it was finally constructed.

until the guardians or directors of the poor, or other proper guardian, or other competent authority, have given, by indenture, relinquishment, or otherwise, adequate power to the mayor, aldermen, and citizens of Philadelphia, or to directors or others by them appointed, to enforce in relation to each orphan every proper restraint, and to prevent relatives or others from interfering with, or withdrawing such orphan from the institution." The testator then provided for a preference, "first, to orphans born in the city of Philadelphia; secondly, to those born in any other part of Pennsylvania; thirdly, to those born in the city of New York; and lastly, to those born in the city of New Orleans." The testator further provided that the orphan "scholars who shall merit it, shall remain in the college until they shall respectively arrive at between fourteen and eighteen years of age."

The testator then, after suggesting that, in relation to the organization of the college and its appendages, he leaves necessarily many details to the mayor, aldermen, and citizens of Philadelphia, and their successors, proceeded to say :

"There are, however, some restrictions which I consider it my duty to prescribe, and to be, amongst others, conditions on which my bequest for said college is made and to be enjoyed, namely: First, I enjoin and require, that if, at the close of any year, the income of the fund devoted to the purposes of the said college shall be more than sufficient for the maintenance of the institution during that year, then the balance of the said income, after defraying such maintenance, shall be forthwith invested in good securities, thereafter to be and remain a part of the capital; but, in no event, shall any part of the said capital be sold, disposed of, or pledged, to meet the current expenses of the said institution, to which I devote the interest, income, and dividends thereof, exclusively. Secondly, I enjoin and require, that no ecclesiastic, missionary, or minister, of any sect whatsoever, shall ever hold or exercise any station or duty whatever in the said college; nor shall any such person ever be admitted for any purpose, or as a visitor, within the premises appropriated to the purposes of the said college."

This second injunction and requirement is that which has been so elaborately commented on at the bar, as derogatory to the Christian religion, and upon which something will be hereafter suggested in the course of this opinion.

The testator then bequeathed the sum of \$500,000, to be invested, and the income thereof applied to lay out, regulate, and light and pave a passage or street in the east part of the city of Philadelphia, fronting the river Delaware, not less than

twenty-one feet wide, and to be called Delaware Avenue, etc.; and to this intent to obtain such acts of Assembly, and to make such purchases or agreements, as will enable the mayor, aldermen, and citizens of Philadelphia to remove or pull down all the buildings, fences, and obstructions which may be in the way, and to prohibit all buildings, fences, or erections of any kind to the eastward of said avenue, etc.; and he proceeded to give other minute directions touching the same.

The testator then bequeathed to the Commonwealth of Pennsylvania the sum of \$300,000, for the purpose of internal improvement by canal navigation, to be paid into the State treasury as soon as such laws shall be enacted by the Legislature to carry into effect the several improvements before specified, and certain other improvements.

The testator then bequeathed the remainder of the residue of his personal estate in trust to invest the same in good securities, etc., so that the whole shall form a permanent fund, and to apply the income thereof to certain specified purposes, which he proceeds to name; and then said:

"To all which objects, the prosperity of the city, and the health and comfort of its inhabitants, I devote the said fund as aforesaid, and direct the income thereof to be applied yearly and every year forever, after providing for the college as hereinbefore directed, as my primary object. But, if the said city shall knowingly and willfully violate any of the conditions hereinbefore and hereinafter mentioned, then I give and bequeath the said remainder and accumulations to the Commonwealth of Pennsylvania, for the purposes of internal navigation; excepting, however, the rents, issues and profits of my real estate in the city and county of Philadelphia, which shall forever be reserved and applied to maintain the aforesaid college, in the manner specified in the last paragraph of the XXIst clause of this will. And if the Commonwealth of Pennsylvania shall fail to apply this or the preceding bequest to the purposes before mentioned, or shall apply any part thereof to any other use, or shall, for the term of one year from the time of my decease, fail or omit to pass the laws hereinbefore specified for promoting the improvement of the city of Philadelphia, then I give, devise, and bequeath the said remainder and accumulations (the rents aforesaid always excepted and reserved for the college as aforesaid) to the United States of America, for the purposes of internal navigation, and no other."

These are the material clauses of the will which seem necessary to be brought under our review in the present controversy. By a codicil dated the 20th of June, A. D. 1831, the testator made the following provision:

"Whereas I, Stephen Girard, the testator named in the foregoing will and testament, dated February 16, 1830, have, since the execution thereof, purchased

several parcels and pieces of land and real estate, and have built sundry messuages, all of which, as well as any real estate that I may hereafter purchase, it is my intention to pass by said will; and whereas, in particular, I have recently purchased from Mr. William Parker the mansion-house, out-buildings, and forty-five acres and some perches of land, called Peel Hall, on the Ridge Road, in Penn Township: now, I declare it to be my intention, and I direct, that the orphan establishment, provided for in my said will, instead of being built as therein directed upon my square of ground between High and Chestnut and Eleventh and Twelfth Streets, in the city of Philadelphia, shall be built upon the estate so purchased from Mr. W. Parker, and I hereby devote the said estate to that purpose, exclusively, in the same manner as I had devoted the said square, hereby directing that all the improvements and arrangements for the said orphan establishment, prescribed by my said will, as to said square, shall be made and executed upon the said estate, just as if I had in my will devoted the said estate to said purpose—consequently, the said square of ground is to constitute, and I declare it to be, a part of the residue and remainder of my real and personal estate, and given and devised for the same uses and purposes as are declared in section XX of my will, it being my intention, that the said square of ground shall be built upon, and improved in such a manner as to secure a safe and permanent income for the purposes stated in the XXth section.”

The testator died in the same year; and his will and codicil were duly admitted to probate on the 31st of December of the same year.

The Legislature of Pennsylvania passed the requisite laws to carry into effect the will, so far as respected the bequests of the \$500,000 for the Delaware Avenue and the \$300,000 for internal improvement by canal navigation, according to the bequest of the testator.

The present bill is brought by the heirs at law of the testator, to have the devise of the residue and remainder of the real estate to the mayor, aldermen, and citizens of Philadelphia, in trust as aforesaid, to be declared void, for the want of capacity of the supposed devisees to take lands by devise, or if capable of taking by devise generally for their own use and benefit, for want of capacity to take such lands as devisees in trust; and because the objects of the charity for which the lands are so devised in trust are altogether vague, indefinite, and uncertain, and so no trust is created by the said will which is capable of being executed or of being cognizable at law or in equity, nor any trust estate devised that can vest at law or in equity in any existing or possible *cestui que trust*; and therefore the bill insists that, as the trust is void, there is a resulting trust thereof for the heirs at law of the testator; and the bill accordingly seeks a

declaration to that effect and the relief consequent thereon, and for a discovery and account, and for other relief.

The principal questions, to which the arguments at the bar have been mainly addressed, are, first, whether the corporation of the city of Philadelphia is capable of taking the bequest of the real and personal estate for the erection and support of a college upon the trusts and for the uses designated in the will; secondly, whether these uses are charitable uses, valid in their nature and capable of being carried into effect consistently with the laws of Pennsylvania; thirdly, if not, whether, being void, the fund falls into the residue of the testator's estate, and belongs to the corporation of the city, in virtue of the residuary clause in the will; or it belongs, as a resulting or implied trust, to the heirs and next of kin of the testator.

As to the first question, so far as it respects the capacity of the corporation to take the real and personal estate, independently of the trusts and uses connected therewith, there would not seem to be any reasonable ground for doubt. The act of 32 and 34 Henry VIII, respecting wills, excepts corporations from taking by devise; but this provision has never been adopted into the laws of Pennsylvania or in force there. The act of 11th of March, 1789, incorporating the city of Philadelphia, provides that the corporators shall have perpetual succession, "and they and their successors shall at all times forever be capable in law to have, purchase, take, receive, possess, and enjoy lands, tenements, and hereditaments, liberties, franchises, and jurisdictions, goods, chattels, and effects, to them and their successors forever, or for any other or less estate," etc., without any limitation whatsoever as to the value or amount thereof, or as to the purposes to which the same were to be applied, except so far as may be gathered from the preamble of the act, which recites that the then administration of government within the city of Philadelphia was in its form "inadequate to the suppression of vice and immorality, to the advancement of the public health and order, and to the promotion of trade, industry, and happiness, and in order to provide against the evils occasioned thereby, it is necessary to invest the inhabitants thereof with more speedy, vigorous, and effective powers of government than at present established." Some, at least, of these objects might

certainly be promoted by the application of the city property or its income to them—and especially the suppression of vice and immorality, and the promotion of trade, industry, and happiness. And if a devise of real estate had been made to the city directly for such objects, it would be difficult to perceive why such trusts should not be deemed within the scope of the city charter and protected thereby.

But without doing more at present than merely to glance at this consideration, let us proceed to the inquiry whether the corporation of the city can take real and personal property in trust. Now, although it was in very early times held that a corporation could not take and hold real or personal estate in trust, upon the ground that there was a defect of one of the requisites to create a good trustee, viz, the want of confidence in the person; yet that doctrine has been long since exploded as unsound, and too artificial; and it is now held, that where the corporation has a legal capacity to take real or personal estate, there it may take and hold it upon trust, in the same manner and to the same extent as a private person may do. It is true that, if the trust be repugnant to, or inconsistent with, the proper purposes for which the corporation was created, that may furnish a ground why it may not be compellable to execute it. But that will furnish no ground to declare the trust itself void, if otherwise unexceptionable; but it will simply require a new trustee to be substituted by the proper court, possessing equity jurisdiction, to enforce and perfect the objects of the trust. This will be sufficiently obvious upon an examination of the authorities; but a single case may suffice. In *Sonley v. The Clock-makers' Company*, 1 Bro. Ch. 81, there was a devise of freehold estate to the testator's wife for life, with remainder to his brother C. in tail, with remainder to the Clock-makers' Company, in trust to sell for the benefit of the testator's nephews and nieces. The devise being to a corporation was, by the English statute of wills, void, that statute prohibiting devises to corporations, and the question was whether, the devise being so void, the heir at law took beneficially or subject to the trust. Mr. Baron EYRE, in his judgment, said, that although the devise to the corporation be void at law, yet the trust is sufficiently created to fasten itself upon any estate the law may raise. This is the ground upon which

courts of equity have decreed, in cases where no trustee is named. Now, this was a case not of a charitable devise, but a trust created for nephews and nieces; so that it steers wide from the doctrines which have been established as to devises to corporations for charities as appointments under the statute of 43 Elizabeth: *a fortiori*, the doctrine of this case must apply with increased stringency to a case where the corporation is capable at law to take the estate devised, but the trusts are utterly *dehors* the purposes of the incorporation. In such a case, the trust itself being good, will be executed by and under the authority of a court of equity. Neither is there any positive objection in point of law to a corporation taking property upon a trust not strictly within the scope of the direct purposes of its institution, but collateral to them; nay, for the benefit of a stranger or of another corporation. In the case of *Green v. Rutherford*, 1 Vesey, 462, a devise was made to St. John's College, in Cambridge, of the perpetual advowson of a rectory in trust, that whenever the church should be void and his nephew be capable of being presented thereto, they should present him; and on the next avoidance should present one of his name and kindred, if there should be any one capable thereof in the college; if none such, they should present the senior divine then fellow of the college; and on his refusal, the next senior divine, and so downward; and, if all refused, they should present any other person they should think fit. Upon the argument of the cause, an objection was taken that the case was not cognizable in a court of equity, but fell within the jurisdiction of the visitor. Sir JOHN STRANGE (the Master of the Rolls), who assisted Lord HARDWICKE at the hearing of the cause, on that occasion said: "A private person would, undoubtedly, be compellable to execute it [the trust]; and, considered as a trust, it makes no difference who are the trustees, the power of this Court operating on them in the capacity of trustees. And though they are a collegiate body, whose founder has given a visitor to superintend his own foundation and bounty; yet as between one claiming under a separate benefactor and these trustees for special purposes, the Court will look on them as trustees only, and oblige them to execute it under direction of the Court." Lord HARDWICKE, after expressing his concurrence in the judgments of the Master

of the Rolls, put the case of the like trust being to present no member of another college, and held that the court would have jurisdiction to enforce it.

But if the purposes of the trust be germane to the objects of the incorporation; if they relate to matters which will promote and aid and perfect these objects; if they tend (as the charter of the city of Philadelphia expresses it) "to the suppression of vice and immorality, to the advancement of the public health and order, and to the promotion of trade, industry, and happiness," where is the law to be found which prohibits the corporation from taking the devise upon such trusts, in a state where the statutes of mortmain do not exist (as they do not in Pennsylvania), the corporation itself having a legal capacity to take the estate as well by devise as otherwise? We know of no authorities which inculcate such a doctrine or prohibit the execution of such trusts, even though the act of incorporation may have for its main objects mere civil and municipal government and regulations and powers. If, for example, the testator by his present will had devised certain estate of the value of \$1,000,000 for the purpose of applying the income thereof to supplying the city of Philadelphia with good and wholesome water for the use of the citizens, from the river Schuylkill (an object which some thirty or forty years ago would have been thought of transcendant benefit), why, although not specifically enumerated among the objects of the charter, would not such a devise upon such a trust have been valid, and within the scope of the legitimate purposes of the corporation, and the corporation capable of executing it as trustees? We profess ourselves unable to perceive any sound objection to the validity of such a trust; and we know of no authority to sustain any objection to it. Yet, in substance, the trust would be as remote from the express provisions of the charter as are the objects (supposing them otherwise maintainable) now under our consideration. In short, it appears to us that any attempt to narrow down the powers given to the corporation so as to exclude it from taking property upon trusts for purposes confessedly charitable and beneficial to the city or the public, would be to introduce a doctrine inconsistent with sound principles, and defeat instead of promoting the true policy of the State. We think, then, that the charter of the city does invest the corporation with

powers and rights to take property upon trust for charitable purposes, which are not otherwise obnoxious to legal animadversion; and therefore, the objection that it is incompetent to take or administer a trust, is unfounded in principle or authority, under the law of Pennsylvania.

It is manifest that the Legislature of Pennsylvania acted upon this interpretation of the charter of the city, in passing the acts of the 24th of March, and the 4th of April, 1832, to carry into effect certain improvements and execute certain trusts, under the will of Mr. Girard. The preamble to the trust act, expressly states that it is passed "to effect the improvements contemplated by the said testator, and to execute, in all other respects, the trusts created by his will," as to which the testator had desired the Legislature to pass the necessary laws. The tenth section of the same act provides, "That it shall be lawful for the mayor, aldermen, and citizens of Philadelphia, to exercise all such jurisdiction, enact all such ordinances, and to do and execute all such things and acts whatsoever, as may be necessary and convenient for the full and entire acceptance, execution, and prosecution of any and all the devises, bequests, trusts, and provisions contained in the said will, etc., etc., to carry which into effect," the testator had desired the Legislature to enact the necessary laws. But what is more direct to the present purpose, because it imports a full recognition of the validity of the devise for the erection of the college, is the provision of the 11th section of the same act, which declares, "That no road or street shall be laid out, or passed through the land in the county of Philadelphia, bequeathed by the late Stephen Girard, for the erection of a college, unless the same shall be recommended by the trustees or directors of the said college, and approved by a majority of the select and common councils of the city of Philadelphia." The other act is also full and direct to the same purpose, and provides, "That the select and common councils of the city of Philadelphia shall be and they are hereby authorized to provide, by ordinance or otherwise, for the election or appointment of such officers and agents as they may deem essential to the due execution of the duties and trusts enjoined and created by the will of the late Stephen Girard." Here, then, there is a positive authority conferred upon the city authorities to act upon the trusts under the will, and to administer

the same through the instrumentality of agents appointed by them. No doubt can then be entertained, that the legislature meant to affirm the entire validity of those trusts, and the entire competency of the corporation to take and hold the property devised upon the trusts named in the will.

It is true that this is not a judicial decision, and entitled to full weight and confidence as such. But it is a legislative exposition and confirmation of the competency of the corporation to take the property and execute the trusts; and if those trusts were valid in point of law, the Legislature would be estopped thereafter to contest the competency of the corporation to take the property and execute the trusts, either upon a *quo warranto* or any other proceeding, by which it should seek to divest the property, and invest other trustees with the execution of the trusts, upon the ground of any supposed incompetency of the corporation. And if the trusts were in themselves valid in point of law, it is plain that neither the heirs of the testator, nor any other private persons, could have any right to inquire into, or contest the right of the corporation to take the property, or to execute the trusts; but this right would belong exclusively to the State in its sovereign capacity, and in its sole discretion, to inquire into and contest the same by a *quo warranto*, or other proper judicial proceeding. In this view of the matter, the recognition and confirmation of the devises and trusts of the will by the Legislature are of the highest importance and potency.

We are, then, led directly to the consideration of the question which has been so elaborately argued at the bar, as to the validity of the trusts for the erection of the college, according to the requirements and regulations of the will of the testator. That the trusts are of an eleemosynary nature, and charitable uses in a judicial sense, we entertain no doubt. Not only are charities for the maintenance and relief of the poor, sick, and impotent, charities in the sense of the common law, but also donations given for the establishment of colleges, schools, and seminaries of learning, and especially such as are for the education of orphans and poor scholars.

The statute of the 43 of Elizabeth, ch. 4, has been adjudged by the Supreme Court of Pennsylvania not to be in force in that state. But then it has been solemnly and recently adjudged by

the same court, in the case of *Zimmerman v. Andres* (January term, 1844), that "it is so considered rather on account of the inapplicability of its regulations as to the modes of proceeding, than in reference to its conservative provisions." "These have been in force here by common usage and constitutional recognition; and not only these, but the more extensive range of charitable uses which chancery supported before that statute and beyond it." Nor is this any new doctrine in that court; for it was formally promulgated in the case of *Witman v. Lex*, 17 Serg. and Rawle, 88, at a much earlier period (1827).

Several objections have been taken to the present bequest, to extract it from the reach of these decisions. In the first place, that the corporation of the city is incapable by law of taking the donation for such trusts. This objection has been already sufficiently considered. In the next place, it is said that the beneficiaries who are to receive the benefit of the charity are too uncertain and indefinite to allow the bequest to have any legal affect, and hence the donation is void, and the property results to the heirs. And in support of this argument, we are pressed by the argument that charities of such an indefinite nature are not good at the common law (which is admitted on all sides to be the law of Pennsylvania, so far as it is applicable to its institutions and constitutional organization and civil rights and privileges), and hence the charity fails; and the decision of this Court in the case of the trustees of the *Philadelphia Baptist Association v. Hart's Executors*, 4 Wheat. 1, is strongly relied on as fully in point. There are two circumstances which materially distinguish that case from the one now before the Court. The first is, that that case arose under the law of Virginia, in which state the statute of 43 Elizabeth, ch. 4, had been expressly and entirely abolished by the Legislature, so that no aid whatsoever could be derived from its provisions to sustain the bequest. The second is, that the donees (the trustees) were an unincorporated association, which had no legal capacity to take and hold the donation in succession for the purposes of the trust, and the beneficiaries also were uncertain and indefinite. Both circumstances, therefore, concurred; a donation to trustees incapable of taking, and beneficiaries uncertain and indefinite. The Court, upon that occasion, went into an elaborate examination of the doctrine of the com-

mon law on the subject of charities, antecedent to and independent of the statute of 43 Elizabeth, ch. 4, for that was still the common law of Virginia. Upon a thorough examination of all the authorities and all the lights (certainly in no small degree shadowy, obscure, and flickering), the Court came to the conclusion that, at the common law, no donation to charity could be enforced in chancery, where both of these circumstances, or rather where both of these defects, occurred. The Court said: "We find no dictum that charities could be established on such an information (by the attorney-general) where the conveyance was defective or the donation was so vaguely expressed that the donee, if not a charity, would be incapable of taking." In reviewing the authorities upon that occasion, much reliance was placed upon *Collison's case*, Hobart's Rep. 136 (S. C. cited Duke on Charities, by Bridgman, 368, Moore, R., 888); and *Platt v. St. John's College, Cambridge*, Finch. Rep. 221 (S. C. 1 Cas. in Chan. R. 267, Duke on Charities, by Bridgman, 379); and the case reported in 1 Chancery cases, 134. But these cases, as also *Flood's case*, Hob. R. 136 (S. C. 1 Equity Abridg. 95, pl. 6), turned upon peculiar circumstances. Collison's case was upon a devise in 15 Henry VIII, and was before the statute of wills. The other cases were cases where the donees could not take at law, not being properly described, or not having a competent capacity to take, so that there was no legal trustee; and yet the devises were held good as valid appointments under the statute of 43 Elizabeth. The dictum of Lord LOUGHBOROUGH, in *Attorney-General v. Bowyer*, 3 Ves. 714-726, was greatly relied on, where he says: "It does not appear that this Court, at that period (that is, before the statute of wills), had cognizance upon information for the establishment of charities. Prior to the time of Lord ELLESMERE, as far as tradition in times immediately following goes, there were no such informations as this upon which I am now sitting (an information to establish a college under a devise before the statute of Mortmain of 9 Geo. 2, ch. 36); but they made out their case as well as they could at law. In this suggestion, Lord LOUGHBOROUGH had under his consideration, *Porter's case*, 1 Co. Rep. 16. But there a devise was made in 32 Henry VIII, to the testator's wife, upon condition for her to grant the lands, etc., in all convenient speed after his decease, for the mainte-

nance and continuance of a certain free-school, and almsmen and almswomen forever. The heir entered for and after condition broken, and then conveyed the same lands to Queen Elizabeth in 34 of her reign; and the queen brought an information of intrusion against Porter for the land in the same year. One question was, whether the devise was not to a superstitious use, and therefore void under the act of 23 Henry VIII, ch. 2, or whether it was good as a charitable use. And it was resolved by the court that the use was a good charitable use, and that the statute did not extend to it. So that here we have a plain case of a charity held good, before the statute of Elizabeth, upon the ground of the common law, there being a good devisee originally, although the condition was broken, and the use was for charitable purposes in some respects indefinitely. Now, if there was a good devisee to take as trustee, and the charity was good at the common law, it seems somewhat difficult to say why, if no legal remedy was adequate to redress it, the Court of Chancery might not enforce the trust, since trusts for other specific purposes were then, at least when there were designated trustees, within the jurisdiction of chancery.

There are, however, dicta of eminent judges (some of which were commented upon in the case of 4 Wheaton, 1), which do certainly support the doctrine that charitable uses might be enforced in chancery upon the general jurisdiction of the court, independently of the statute of 43 Elizabeth; and that the jurisdiction had been acted upon not only subsequent but antecedent to that statute. Such was the opinion of Sir JOSEPH Jekyll in *Eyre v. Countess of Shaftsbury*, 2 P. Will. 102, 2 Equity Abridg. 710, pl. 2, and that of Lord NORTHINGTON in *Attorney-General v. Tancred*, 1 Eden. 10 (S. C. Ambler, 351, 1 Wm. Black. 90), and that of Lord Chief Justice WILMOT in his elaborate judgment in *Attorney-General v. Lady Denning*, - Wilmot's Notes, p. 1, 26, given after an examination of all the leading authorities. Lord ELDON, in the *Attorney-General v. The Skinner's Company*, 2 Russ. 407, intimates in clear terms his doubts whether the jurisdiction of chancery over charities arose solely under the statute of Elizabeth; suggesting that the statute has been perhaps construed with reference to a supposed antecedent jurisdiction of the court, by which void devises to charitable

purposes were sustained. Sir JOHN LEACH, in the case of a charitable use before the statute of Elizabeth, *Attorney-General v. The Master of Brentwood School*, 1 Mylne and Keen, 376, said: "Although at his time no legal devise could be made to a corporation for a charitable use, yet lands so devised were in equity bound by a trust for the charity, which a court of equity would then execute." In point of fact, the charity was so decreed in that very case, in the 12th year of Elizabeth. But what is still more important, is the declaration of Lord REDESDALE, a great judge in equity, in the *Attorney-General v. The Mayor of Dublin*, 1 Bligh, 312, 347 (1827), where he says: "We are referred to the statute of Elizabeth with respect to charitable uses, as creating a new law upon the subject of charitable uses. That statute only created a new jurisdiction; it created no new law. It created a new and ancillary jurisdiction, a jurisdiction created by commission, etc.; but the proceedings of that commission were made subject to appeal to the Lord Chancellor, and he might reverse or affirm what they had done, or make such order as he might think fit for reserving the controlling jurisdiction of the Court of Chancery as it existed before the passing of that statute; and there can be no doubt that by information by the attorney-general the same thing might be done." He then adds: "The right which the attorney-general has to file an information, is a right of prerogative. The king, as *parens patriæ*, has a right, by his proper officer, to call upon the several courts of justice, according to the nature of their several jurisdictions, to see that right is done to his subjects who are incompetent to act for themselves, as in the case of charities and other cases." So that Lord REDESDALE maintains the jurisdiction in the broadest terms, as founded in the inherent jurisdiction of chancery independently of the statute of 43 Elizabeth. In addition to these dicta and doctrines, there is the very recent case of the *Incorporated Society v. Richards*, 1 Drury and Warren, 258, where Lord Chancellor SUGDEN, in a very masterly judgment, upon a full survey of all the authorities, and where the point was directly before him, held the same doctrine as Lord REDESDALE, and expressly decided that there is an inherent jurisdiction in equity in cases of charity, and that charity is one of those objects for which a court of equity has

at all times interfered to make good that which at law was an illegal or informal gift; and that cases of charity in courts of equity in England were valid independently of and previous to the statute of Elizabeth.

Mr. Justice BALDWIN, in the case of the will of Sarah Zane, which was cited at the bar, and pronounced at April term of the Circuit Court, in 1833, after very extensive and learned researches into the ancient English authorities and statutes, arrived at the same conclusion, in which the district judge, the late lamented Judge HOPKINSON, concurred; and that opinion has a more pointed bearing upon the present case, since it included a full review of the Pennsylvania laws and doctrines on the subject of charities.

But very strong additional light has been thrown upon this subject by the recent publications of the commissioners on the public records in England, which contain a very curious and interesting collection of the chancery records in the reign of Queen Elizabeth, and in the earlier reigns. Among these are found many cases in which the Court of Chancery entertained jurisdiction over charities long before the statute of 43 Elizabeth; and some fifty of these cases, extracted from the printed calendars, have been laid before us. They establish in the most satisfactory and conclusive manner, that cases of charities where there were trustees appointed for general and indefinite charities, as well as for specific charities, were familiarly known to, and acted upon, and enforced in the Court of Chancery. In some of these cases the charities were not only of an uncertain and indefinite nature, but, as far as we can gather from the imperfect statement in the printed records, they were also cases where there were either no trustees appointed, or the trustees were not competent to take. These records, therefore, do in a remarkable manner, confirm the opinions of Sir JOSEPH JEKYLL, Lord NORTHINGTON, Lord Chief Justice WILMOT, Lord REDESDALE, and Lord Chancellor SUGDEN. Whatever doubts, therefore, might properly be entertained upon the subject when the case of the *Trustees of the Philadelphia Baptist Association v. Hart's Executors*, 4 Wheaton, 1, was before this Court (1819), those doubts are entirely removed by the late and more satisfactory sources of information to which we have alluded.

If, then, this be the true state of the common law on the subject of charities, it would, upon the general principle already suggested, be a part of the common law of Pennsylvania. It would be no answer to say that, if so, it was dormant, and that no court possessing equity powers now exists, or has existed, in Pennsylvania, capable of enforcing such trusts. The trusts would nevertheless be valid in point of law; and remedies may from time to time be applied by the Legislature to supply the defects. It is no proof of the non-existence of equitable rights, that there exists no adequate legal remedy to enforce them. They may during the time slumber, but they are not dead.

But the very point of the positive existence of the law of charities in Pennsylvania, has been (as already stated) fully recognized and enforced in the State courts of Pennsylvania, as far as their remedial powers would enable these courts to act. This is abundantly established in the cases cited at the bar, and especially by the case of *Witman v. Lex*, 17 Serg. and Raw. 88, and that of *Sarah Zane's Will*, before Mr. Justice BALDWIN and Judge HOPKINSON. In the former case, the court said "that it is immaterial whether the person to take be *in esse* or not, or whether the legatee were at the time of the bequest a corporation capable of taking or not, or how uncertain the objects may be, provided there be a discretionary power vested anywhere over the application of the testator's bounty to those objects, or whether their corporate designation be mistaken. If the intention sufficiently appears in the bequest, it would be valid." In the latter case, certain bequests given by the will of Mrs. Zane to the Yearly Meeting of Friends in Philadelphia, an incorporated association, for purposes of general and indefinite charity, were, as well as other bequests of a kindred nature, held to be good and valid; and were enforced accordingly. The case, then, according to our judgment, is completely closed in by the principles and authorities already mentioned, and is that of a valid charity in Pennsylvania, unless it is rendered void by the remaining objection which has been taken to it.

This objection is, that the foundation of the college upon the principles and exclusions prescribed by the testator is derogatory and hostile to the Christian religion, and so is void, as being against the common law and public policy of Pennsylvania; and

this for two reasons: first, because of the exclusion of all ecclesiastics, missionaries, and ministers of any sect from holding or exercising any station or duty in the college, or even visiting the same; and secondly, because it limits the instruction to be given to the scholars to pure morality, and general benevolence, and a love of truth, sobriety, and industry, thereby excluding, by implication, all instruction in the Christian religion.

In considering this objection, the Court are not at liberty to travel out of the record in order to ascertain what were the private religious opinions of the testator (of which indeed we can know nothing), nor to consider whether the scheme of education by him prescribed, is such as we ourselves should approve, or as is best adapted to accomplish the great aims and ends of education. Nor are we at liberty to look at general considerations of the supposed public interests and policy of Pennsylvania upon this subject, beyond what its Constitution and laws and judicial decisions make known to us. The question, What is the public policy of a State, and what is contrary to it? if inquired into beyond these limits, will be found to be one of great vagueness and uncertainty, and to involve discussions which scarcely come within the range of judicial duty and functions, and upon which men may and will complexionally differ; above all, when that topic is connected with religious polity, in a country composed of such a variety of religious sects as our country, it is impossible not to feel that it would be attended with almost insuperable difficulties, and involve differences of opinion almost endless in their variety. We disclaim any right to enter upon such examinations, beyond what the State constitutions and laws and decisions necessarily bring before us.

It is also said, and truly, that the Christian religion is a part of the common law of Pennsylvania. But this proposition is to be received with its appropriate qualifications, and in connection with the bill of rights of that State, as found in its constitution of government. The Constitution of 1790 (and the like provision will, in substance, be found in the Constitution of 1776, and in the existing Constitution of 1838) expressly declares, "That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect, or support

any place of worship, or to maintain any ministry, against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience; and no preference shall ever be given by law to any religious establishments or modes of worship." Language more comprehensive for the complete protection of every variety of religious opinion could scarcely be used; and it must have been intended to extend equally to all sects, whether they believed in Christianity or not, and whether they were Jews or infidels. So that we are compelled to admit that although Christianity be a part of the common law of the State, yet it is so in this qualified sense, that its Divine origin and truth are admitted, and therefore it is not to be openly and maliciously reviled and blasphemed against, to the annoyance of believers or the injury of the public. Such was the doctrine of the Supreme Court of Pennsylvania in *Updegraff v. The Commonwealth*, 11 Serg. and Raw. 394.

It is unnecessary for us, however, to consider what would be the legal effect of a devise in Pennsylvania for the establishment of a school or college for the propagation of Judaism, or deism, or any other form of infidelity. Such a case is not to be presumed to exist in a Christian country; and therefore it must be made out by clear and indisputable proof. Remote inferences, or possible results, or speculative tendencies, are not to be drawn or adopted for such purposes. There must be plain, positive, and expressive provisions, demonstrating not only that Christianity is not to be taught, but that it is to be impugned or repudiated.

Now, in the present case, there is no pretense to say that any such positive or express provisions exist, or are even shadowed forth in the will. The testator does not say that Christianity shall not be taught in the college; but only that no ecclesiastic of any sect shall hold or exercise any station or duty in the college. Suppose, instead of this, he had said that no person but a layman shall be an instructor or officer or visitor in the college, what legal objection could have been made to such a restriction? And yet the actual prohibition is in effect the same in substance. But it is asked, Why are ecclesiastics excluded, if it is not because they are the stated and appropriate preachers of Christianity? The answer may be given in the very

words of the testator. "In making this restriction," says he, "I do not mean to cast any reflection upon any sect or person whatever. But, as there is such a multitude of sects, and such a diversity of opinion amongst them, I desire to keep the tender minds of the orphans, who are to derive advantage from this bequest, free from the excitement which clashing doctrines and sectarian controversy are so apt to produce." Here, then, we have the reason given; and the question is not whether it is satisfactory to us or not, nor whether the history of religion does or does not justify such a sweeping statement; but the question is, whether the exclusion be not such as the testator had a right, consistently with the laws of Pennsylvania, to maintain, upon his own notions of religious instruction. Suppose the testator had excluded all religious instructors but Catholics, or Quakers, or Swedenborgians; or, to put a stronger case, he had excluded all religious instructors but Jews, would the bequest have been void on that account? Suppose he had excluded all lawyers, or all physicians, or all merchants, from being instructors or visitors, would the prohibition have been fatal to the bequest? The truth is, that in cases of this sort, it is extremely difficult to draw any just and satisfactory line of distinction, in a free country, as to the qualifications or disqualifications which may be insisted upon by the donor of a charity as to those who shall administer or partake of his bounty.

But the objection itself assumes the proposition that Christianity is not to be taught, because ecclesiastics are not to be instructors or officers. But this is by no means a necessary or legitimate inference from the premises. Why may not laymen instruct in the general principles of Christianity, as well as ecclesiastics? There is no restriction as to the religious opinions of the instructors and officers. There may be, and doubtless, under the auspices of the city government, there will always be, men not only distinguished for learning and talent, but for piety and elevated virtue, and holy lives and characters. And we can not overlook the blessings which such men, by their conduct, as well as their instructions, may—nay, must—impart to their youthful pupils. Why may not the Bible, and especially the New Testament, without note or comment, be read and taught as a Divine revelation in the college—its general precepts expounded, its

evidences explained, and its glorious principles of morality inculcated? What is there to prevent a work, not sectarian, upon the general evidences of Christianity, from being read and taught in the college by lay-teachers? Certainly there is nothing in the will that proscribes such studies. Above all, the testator positively enjoins "that all the instructors and teachers in the college shall take pains to instill into the minds of the scholars the purest principles of morality, so that on their entrance into active life they may from inclination and habit evince benevolence toward their fellow-creatures, and a love of truth, sobriety, and industry, adopting at the same time such religious tenets as their matured reason may enable them to prefer." Now, it may well be asked, what is there in all this, which is positively enjoined, inconsistent with the spirit or truths of Christianity? Are not these truths all taught by Christianity, although it teaches much more? Where can the purest principles of morality be learned so clearly or so perfectly as from the New Testament? Where are benevolence, the love of truth, sobriety, and industry, so powerfully and irresistibly inculcated as in the Sacred Volume? The testator has not said how these great principles are to be taught, or by whom, except it be by laymen, nor what books are to be used to explain or enforce them. All that we can gather from his language is, that he desired to exclude sectarians and sectarianism from the college, leaving the instructors and officers free to teach the purest morality, the love of truth, sobriety, and industry, by all appropriate means; and of course including the best, the surest, and the most impressive. The objection, then, in this view, goes to this: either that the testator has totally omitted to provide for religious instruction in his scheme of education (which, from what has been already said, is an inadmissible interpretation), or that it includes but partial and imperfect instruction in those truths. In either view, can it be truly said that it contravenes the known law upon the subject of charities, or is not allowable under the article of the bill of rights already cited? Is an omission to provide for instruction in Christianity in any scheme of school or college education a fatal defect, which avoids it according to the law of Pennsylvania? If the instruction provided for is incomplete and imperfect, is it equally fatal? These questions are propounded,

because we are not aware that any thing exists in the Constitution or laws of Pennsylvania, or the judicial decisions of its tribunals, which would justify us in pronouncing that such defects would be so fatal. Let us take the case of a charitable donation to teach poor orphans reading, writing, arithmetic, geography, and navigation, and excluding all other studies and instruction; would the donation be void as a charity in Pennsylvania, as being deemed derogatory to Christianity? Hitherto it has been supposed, that a charity for the instruction of the poor might be good and valid in England, even if it did not go beyond the establishment of a grammar-school. And in America it has been thought, in the absence of any express legal prohibitions, that the donor might select the studies, as well as the classes of persons, who were to receive his bounty, without being compellable to make religious instruction a necessary part of those studies. It has hitherto been thought sufficient, if he does not require any thing to be taught inconsistent with Christianity.

Looking to the objection, therefore, in a mere judicial view, which is the only one in which we are at liberty to consider it, we are satisfied that there is nothing in the devise establishing the college, or in the regulations and restrictions contained therein, which are inconsistent with the Christian religion, or are opposed to any known policy of the State of Pennsylvania.

This view of the whole matter renders it unnecessary for us to examine the other and remaining question, to whom, if the devise were void, the property would belong, whether it would fall into the residue of the estate devised to the city, or become a resulting trust for the heirs at law.

Upon the whole, it is the unanimous opinion of the Court, that the decree of the Circuit Court of Pennsylvania dismissing the bill, ought to be affirmed; and it is accordingly affirmed with costs.

GIRARD v. PHILADELPHIA.

[Decided at the December term, 1868, of the Supreme Court of the United States, Associate Justice ROBERT C. GRIER delivering the opinion. Reported in 7 Wallace, 1.]

GIRARD WILL CASE.—No. 2.

Where a testator devises the income of property in trust primarily for one object, and if the income is greater than the object needs, the surplus to others (secondary ones), a bill in the nature of a bill *quia timet*, and in anticipation of an incapacity in the trusts to be executed hereafter, and when a surplus arises (there being no surplus now, nor the prospect of any), will not lie by heirs at law (supposing them otherwise entitled, which here they were decided not to be) to have this surplus appropriated to them on the ground of the secondary trusts having, subsequently to the testator's death, become incapable of execution.

Neither the identity of a municipal corporation, nor its right to hold property devised to it, is destroyed by a change of its name, an enlargement of its area, or an increase in the number of its corporators. And these are changes which the Legislature has power to make.

Under the will of Stephen Girard [for the terms of which see preceding case of *Vidal v. Girard*, herein, page 214], the whole final residuary of his estate was left to the old city of Philadelphia in trust, to apply the income, 1. For the maintenance and improvement of the college as a primary object; and after that, 2. To improve its police; 3. To improve the city property and the general appearance of the city, and to diminish the burden of taxation,—the court having declared that so long as any portion of the income should be found necessary for improvement and maintenance of the college, the second and third objects could claim nothing, and the whole income being, in fact, necessary for the college. *Held*, 1. That no question arose at this time as to whether the new city should apply the surplus under the trusts for the secondary objects to the benefit of the new city, or to that portion of it alone embraced in the limits of the old one; 2. That whether or not the trusts being, as was decided in *Vidal v. Girard* [preceding, page 214], in themselves valid, Girard's heirs could not inquire or contest the right of the city corporation to take the property or to execute the trusts, this right belonging to the State alone as *parens patriæ*.

APPEAL from the Circuit Court for the Eastern District of Pennsylvania—the case as presented by the bill and answer being thus:

The city of Philadelphia, as originally laid out in 1683, and as incorporated in 1701, was situated upon a rectangular plot of ground, bounded in one direction by two streets, called Vine and South, a mile apart, and in the other by two rivers (the

Delaware and the Schuylkill), two miles apart—the corporate title of the city being “the Mayor, Aldermen, and Citizens of Philadelphia.” Upon the neck of land above described the corporate city continued to be contained until 1854; the inhabitants outside or adjoining it being incorporated at different times, and as their numbers extended, into bodies politic, under different names, by the State Legislature, and with the city, forming the county of Philadelphia. In 1798, the Revolution having dissolved the old corporation, the Legislature incorporated the city with larger powers, and prior to 1854, nearly twenty acts had been passed altering that law, and forming, the whole of them, what was popularly called the charter of the city; but as already said, from 1683 to 1854, the city limits were the same.

[In this state of things Stephen Girard, in 1831, left by will the real and personal residue of an estate of some millions of dollars, to “the Mayor, Aldermen, and Citizens of Philadelphia,” in trust, to found a college (for the terms of which see the preceding case of *Vidal v. Girard*, page 214), with a residuary disposition as shown therein and by the syllabus in the present case.]

The above-described city corporation, “the Mayor, Aldermen, and Citizens of Philadelphia,” having accepted the trust, and built and furnished the college and out-buildings, administered the charity through its organs until 1854. By that time twenty-eight municipal corporations, making the residue of the county, had grown up around the old “city,” some near, some far off, some populous, some occupied yet by farms. They comprised “districts,” boroughs, townships; were of various territorial extent, and differed in the details of their respective organizations. In the year named, the Legislature of Pennsylvania passed what is known in Philadelphia as the Consolidation Act.

By this act the administration of all the concerns of the twenty-nine corporations, including their debts, taxes, property, police, and whatever else pertained to municipal office, and also the government of the county itself, were consolidated into one. All the powers, rights, privileges, and immunities incident to a municipal corporation, and necessary for the proper government of the same, and those of the “Mayor, Aldermen, and Citizens of Philadelphia,” and “all the powers, rights, privileges, and immunities possessed and enjoyed by the other twenty-eight corporate bodies, which, with the old city, made up the county of Philadel-

phia;" and also "the board of police of the police district, the commissioners of the county of Philadelphia, the treasurer and auditor thereof, the county boards, the commissioners of the sinking fund, and the supervisors of the townships," were, by virtue of the process of consolidation, vested in "the city of Philadelphia, as established by this act." A police board was to fix the whole number of policemen "*for the service of the whole city.*" The "right, title, and interest" of the "several municipal corporations mentioned in this act, of, in, and to all the lands, tenements, and hereditaments, goods, chattels, moneys, effects, and of, in, and to all other property and estate whatsoever and wheresoever, belonging to any or either of them," were "vested in the city of Philadelphia;" and all "estates and incomes held in trust by the county, *present city*, and each of the townships, districts, and other municipal corporations, united by this act," were "vested in the city of Philadelphia, *upon and for the same uses, trusts, limitations, charities*, and conditions as the same are now held by the said corporations respectively." The act also declared that the new city corporation should be "vested with all the powers, rights, privileges, and immunities" of the old one. The "net debt of the county of Philadelphia, and the several net debts of the guardians for the relief and employment of the poor of the city of Philadelphia," and of the Board of Health, "and of the controllers of the public schools," and of such of the said twenty-nine municipalities, eighteen being enumerated, as had contracted debts, were consolidated and formed into one debt, to be called the debt of the city of Philadelphia, in lieu of the present separate debts so consolidated. The consolidation was carried into full effect. The act provided that the corporators of the new city, having elected a mayor and councils, the councils should direct the mayor to appoint a day when "all the powers, rights, privileges, and immunities possessed and enjoyed by the various corporations, and those also of the old city, should cease and terminate;" and the councils did accordingly, by resolution, direct the mayor to "issue his proclamation forthwith dissolving the different corporations superseded by this act, to take effect on the 30th instant;" and in obedience thereto the mayor, by public proclamation, dated the 24th June, 1854, proclaimed that "all the powers, rights, privileges,

and immunities possessed and enjoyed" by the now late twenty-eight municipalities, and "by the present mayor and councilmen" of the city of Philadelphia, from the said 30th day of June, 1854, should "cease and determine."

The old city covered about two square miles; the new one, which covered the whole county of Philadelphia, about a hundred and twenty-nine. In point of population, however, the old city embraced a fourth or fifth part of all the inhabitants of the new one. In the popular branch of the new city legislature, composed of eighty-five members, the old city enjoyed twenty. In the higher branch it had six members, the residue having eighteen. The debt of the old city had been small, and its credit high. By the consolidation the debt became large.

In the erection and furnishing of the college and out-buildings, the whole fund of \$2,000,000 had been exhausted, and the whole income of the final residuary fund was now habitually drawn upon for the maintenance and education of the orphans, numbering, at the time when the bill was filed, about 330, and limited to this number, because the income from even the residuary fund was inadequate to the maintenance and education of a greater number. However, a part of Girard's estate consisted of coal lands in Pennsylvania, not yet ripe for being worked, whose value was largely increased, and from which, when it should be found expedient to work them, the revenue would, perhaps, be very great.

In this state of things, certain heirs of Girard filed their bill in the court below, praying for an account; and that a master might be appointed to inquire into the gross value and their present capacity for annual yield of the coal lands, and if such an inquiry showed a capacity for affording income "immensely" beyond all the wants of the college, and all proper charges on the estate, that then, if the court should be of opinion that the whole residuary estate was applicable to the college (a matter denied by the bill), that it would decree "such surplus, found to exist beyond and beside all possible and lawful wants of the college," etc., to the complainants.

The court below dismissed the bill, which action of it was the ground of the appeal.

Mr. *C. Ingersoll*, for the appellants. Messrs. *Meredith* and *Olmstead*, for appellee.

Mr. Justice GRIER delivered the opinion of the Court; and after observing that the attempt to restrain the alienation of the realty, being inoperative, could not affect the validity of the devise, and that the income of the whole residuary was devoted to the three objects stated by the testator, the college being the "primary object," and that so long as any portion of this residuary fund should be found necessary for "*its* improvement and maintenance," on the plan and to the extent declared in the will, the second and third objects could claim nothing: proceeded as follows:

The bill admits it to be a valid charity, and claims only the residue after that is satisfied. Now, it is admitted (for it has been so decided, *Vidal v. Girard*, antecedent, page 214) that till February, 1854, the corporation was vested with a complete title to the whole residue of the estate of Stephen Girard, subject to these charitable trusts, and consequently, at that date, his heirs at law had no right, title, or interest whatsoever in the same. But the bill alleges that the act of the Legislature of that date (commonly called the "Consolidation Act"), which purports to be a supplement to the original act incorporating the city, has either dissolved or destroyed the identity of the original corporation, and it is consequently unable any longer to administer the trusts. Now, if this were true, the only consequence would be, not that the charities or trust should fail, but that the chancellor should substitute another trustee.

It is not insisted that the mere change or abbreviation of the name has destroyed the identity of the corporation. The bill even admits that a small addition to its territory and jurisdiction might not have that effect, but that the annexation of twenty-nine boroughs and townships has smothered it to death, or rendered it utterly incapable of administering trusts or charities committed to it when its boundaries were Vine and South Streets and the two rivers. There is nothing to be found in the letter or spirit of this act which shows any intention in the Legislature to destroy the original corporation, either by changing its name, enlarging its territory, or increasing the number of its corporators.

On the contrary, "all its powers, rights, privileges, and immunities," etc., "are continued in full vigor and effect." It provides, also, that "all the estates," etc., held by any of the corporations united by the act, shall be held "upon and for the same uses, trusts, limitations, charities, and conditions as the same were then held."

By the act of 4th of April, 1852, the corporation was "authorized to exercise all such jurisdiction, to enact all such ordinances, and to do and execute all such acts and things whatsoever, as may be necessary for the full and entire acceptance, execution, and prosecution of any and all the devises, bequests, trusts, and provisions contained in said will." It may also "provide, by ordinance or otherwise, for the election and appointment of such officers and agents as they may deem essential to the due execution of the duties and trusts enjoined and created by the will of the late Stephen Girard."

Now, it can not be pretended that the Legislature had not the power to appoint another trustee if the act had dissolved the corporation, or to continue the rights, duties, trusts, etc., in the enlarged corporation. It has done so, and has given the widest powers to the trustee to administer the trusts and charities, according to the intent of the testator, as declared in his will.

The Legislature may alter, modify, or even annul the franchises of a public municipal corporation, although it may not impose burdens on it without its consent. In this case, the corporation has assented to accept the changes, assume the burdens, and perform the duties imposed upon it; and it is difficult to conceive how they can have forfeited their right to the charities which the law makes it their duty to administer. The objects of the testator's charity remain the same while the city, large or small, exists; the trust is an existing and valid one; the trustee is vested by law with the estate, and the fullest power and authority to execute the trust.

Whatever the fears or fancy of the complainants may be, as to the moral ability of the overgrown corporation, there is no necessity or natural inability which prohibits it from administering this charity as faithfully as it could before its increase. In fact, it is a matter in which the complainants have no concern whatever, or any right to intervene. If the trust be not

rightly administered, the *cestui que trust*, or the sovereign, may require the courts to compel a proper execution.

In the case of *Vidal* (preceding, page 226), the Supreme Court say that, "if the trusts were in themselves valid in point of law, it is plain that neither the heirs of the testator, nor any other private person, would have any right to inquire into or contest the right of the corporation to take the property or execute the trust; this would exclusively belong to the State in its sovereign capacity, and as *parens patriæ*, and its sole discretion."

This is not an assertion that the Legislature, as *parens patriæ*, may interfere, by retrospective acts, to exercise the *cypres* power, which has become so odious from its application in England to what were called superstitious uses. *Baxter's Case*, and other similar ones, can not be precedents where there is no Established Church which treats all dissent as superstition. But it can not admit of a doubt that, where there is a valid devise to a corporation, in trust for charitable purposes, unaffected by any question as to its validity because of superstition, the sovereign may interfere to enforce the execution of the trusts, either by changing the administrator, if the corporation be dissolved, or, if not, no modifying or enlarging its franchises, or change in its name, while its identity remains, can affect its rights to hold property devised to it for any purpose. Nor can a valid vested estate, in trust, lapse or become forfeited by any misconduct in the trustee, or inability in the corporation to execute it, if such existed. Charity never fails; and it is the right, as well as the duty, of the sovereign, by its courts and public officers, as also by legislation (if needed), to have the charities properly administered.

Now, there is no complaint here that the charity, so far as regards the primary and great object of the testator, is not properly administered; and it does not appear that there *now* is, or ever will be, any residue to apply to the secondary objects. If that time should ever arrive, the question, whether the charity shall be so applied as to have the "effect to diminish the burden of taxation" on all the corporation, or only those within the former boundaries of the city, will have to be decided. The case of *Soohan v. The City*, 33 Pennsylvania State, 9, does not

decide it; nor is this Court bound to decide it. The answer shows how it may be done, and the corporation has ample power conferred on it to execute the trust according to either hypothesis; and, if further powers were necessary, the Legislature, executing the sovereign power, can certainly grant them. In the mean time the heirs at law of the testator have no concern in the matter, or any right to interfere by a bill *quia timet*. Their anticipations of the future perversion of the charity by the corruption or folly of the enlarged corporation, and the moral impossibility of its just administration, are not sufficient reasons for the interference of this Court to seize upon the fund, or any part of it, and to deliver it up to the complainants, who never had, and by the will of Stephen Girard were not intended to have, any right, title, or claim whatsoever to the property.

In fine, the bill was rightly dismissed, because:

1. The residue of the estate of Stephen Girard, at the time of his death, was, by his will, vested in the corporation on valid legal trust, which it was fully competent to execute.

2. By the supplement to the act incorporating the city (commonly called the "Consolidation Act"), the identity of the corporation is not destroyed; nor can the change in its name, the enlargement of its area, or increase in the number of its corporators, affect its title to property held at the time of such change.

3. The corporation, under its amended charter, has every capacity to hold, and every power and authority necessary to execute the trusts of the will.

4. That the difficulties anticipated by the bill, as to the execution of the secondary trusts, are imaginary. They have not arisen, and most probably never will.

5. And if they should, it is a matter, whether probable or improbable, with which the complainants have no concern, and can not have in any possible contingency (a).

DECREE AFFIRMED WITH COSTS.

(a) A THIRD case involving the validity and construction of the Girard will (or, rather, preceding this last one in the Federal courts), is that of *Philadelphia v. The Heirs of Girard*, reported in 45 Pennsylvania State, 9. This was an ejectment brought by the heirs, in Schuylkill County, for the twenty tracts of coal lands, and judgment below was in their favor. On error to the Supreme Court, the judgment below was reversed, LOURIE, C. Justice, delivering the opinion, holding that the decision in 2 Howard settled the controversy.

ROBERTS v. ROBERTS.

[Decided at the Summer term, 1870, of the Court of Appeals of Kentucky, Judge M. R. HARDIN delivering the opinion of the Court. Reported in 7 Bush, 100.]

APPEAL FROM HARRISON CIRCUIT COURT.

In this case an estate devised to a widow for life, with remainder to children, was disposed of by consent of all parties interested, and the proceeds were deposited with one of the children, to be held subject to the use of the life-tenant, in lieu of the estate so disposed of. The proceeds were so held for many years, and until after the death of the life-tenant, when the devisees in remainder instituted a suit, in which a distribution of the fund was sought. The defendant, who received and held the fund as aforesaid, pleaded the statute of limitations. *Held*, that the fund was held in lieu of the estate disposed of, and subject to the life-estate and ultimate rights of the remainder-men; that it was so held, notwithstanding the desire of some of the devisees in remainder that he should distribute the funds amongst them during the life of the life-tenant; and that *the statute of limitations did not commence to run until the termination of the life-estate*.

When a person holding a life-estate in property converts the entire estate to his own use, with the effect of defeating the enjoyment of the estate in remainder, he becomes immediately responsible to the remainder-men, who have a right to recover against him the full value of their estate; and the cause of action, which consists in the injury to the estate in remainder, accrues as soon as the wrong has been committed, and from that time, therefore, limitation runs, *Coffey v. Wilkerson*, 1 Metcalfe, 101.

When the property is sold, whether by the tenant for life or a volunteer under him, with the assent of the remainder-men, in order that the proceeds may be held in lieu of the property for the ultimate benefit of the owners in remainder, the transaction will constitute an express trust between the holder of the fund and those who will finally be entitled to it; and as in such a case there is no adverse possession of the fund, the trust will not be barred by any length of time, *Hill on Trustees*, 263; *Lewin on Trusts*, 744; 17 B. Monroe, 446.

In case of an express continuing trust, the statute of limitations does not begin to run, as against the *cestui que trust* and in favor of the trustee, until there has been some open express denial of the right of the former, and what amounts to an adverse possession or assertion of right on the part of the latter, *Hill on Trustees*, 264; *Bohannon's Heirs v. Skreshley's Executors*, 2 B. Monroe, 437.

W. W. Trimble, for appellant. John O. Hodges and J. M. Givens, for appellee.

JUDGE HARDIN delivered the opinion of the Court: Hugh Roberts, Sr., died, in 1826, leaving a will by which he devised his whole estate which might remain after the payment of debts, consisting of a small tract of land, several slaves, and some personal property to his wife, Elizabeth Roberts, for life, and afterward to be equally divided among his "surviving children."

The tenant for life lived upon the land till her death, which occurred in 1864, her son, Barnett Roberts, residing with her, and having management of the farm and such of the slaves and other property as remained in her possession under the will.

The testator had eight children living at his death, part of whom died, leaving issue during the life of Elizabeth Roberts, and none of them survived her except said Barnett Roberts, and Hugh Roberts, Jr., Henry Roberts, and America Roberts. It appears that about 1838 three of the slaves, named Joe, Milly, and Mary, being of vicious character or ungovernable, were sold to a slave-trader for \$1,225, with the assent or active concurrence of said Elizabeth Roberts and all of the children of her late husband who were then living, and the money was paid to Barnett Roberts, to be held subject to the use of Elizabeth Roberts in lieu of the slaves, and that he kept it with its accumulating interest for many years on loan in the hands of Benson Roberts; and some time afterward a slave named Brice was also sold, and part of the price retained by Barnett Roberts. It seems also that said Barnett, about 1844, purchased from his brother, William Roberts, such interest as the latter had in remainder in the estate of Hugh Roberts, Sr., and that he afterward became the purchaser of the interest of Hugh Roberts, Jr.; and that in December, 1858, said Elizabeth transferred to him all her interest in the estate as tenant for life under the will of Hugh Roberts, deceased.

On the 10th day of March, 1865, Barnett Roberts, being then the administrator of the estate of said Elizabeth, brought this suit in equity, seeking a construction of the will of Hugh Roberts, deceased, and the judgment of the court determining the rights of himself and the other devisees in remainder in the estate which remained in his possession. By cross-pleadings, filed by America Roberts and others, they sought to hold the plaintiff responsible for the money in his hands arising from the

sales of the slaves; and in his reply he pleaded the statute of limitations in bar of the claim.

The court adjudged that, under the will of Hugh Roberts, deceased, his four children, Barnett, Henry, Hugh, and America only, who survived his widow, took the estate remaining at her death; and that, although the money arising from the sale of the slaves came to the plaintiff's hands, the claim against him for it was barred by limitation.

On this appeal, which is prosecuted by America Roberts alone, the principal question presented for the decision of this Court is, Did the statute of limitations constitute a bar to the claim for the proceeds of the slaves?

In *Coffey v. Wilkerson, etc.*, 1 Met. 101, it was held, as we think, upon well-settled principles, that where a person holding the life-estate in property converts not merely that estate, but the absolute and entire estate in the property to his own use, and that with the effect of defeating the enjoyment of the estate in remainder, he becomes immediately responsible for the act to the persons entitled in remainder, who have a right to recover against him the full value of their estate; and that the cause of action, which consists in the injury to the estate in remainder, accrues as soon as the wrong has been committed, and from that time therefore limitation runs.

But the application of this doctrine must in particular cases depend on the nature of the act of conversion, and its immediate effects on the rights of the persons owning the property in remainder. For if the property be sold, whether by the tenant for life or a volunteer under him, with the assent of the remainder-men, in order that the proceeds may be held in lieu of the property for the ultimate benefit of the owners in remainder, the transaction will constitute an express trust between the holder of the funds and those who will finally be entitled to it; and, as in such case there is no adverse possession of the funds, the trust will not be barred by any length of time, *Hill on Trustees*, 263; *Lewin on Trusts and Trustees*, 744; 17 B. Monroe, 446.

It has been often and uniformly ruled, that in the case of an express continuing trust the statute of limitations does not begin to run, as against the *cestui que trust* and in favor of the trustee, until there has been some open express denial of the right of the

former, and what amounts to an adverse possession or assertion of right on the part of the latter, *Hill on Trustees*, 264; *Bohannon's Heirs v. Sthreshley's Executors*, 2 B. Monroe, 437 (a).

In this case neither the allegations of the reply, nor the proof as to the receipt and control of the price of the slaves, Joe, Milly, and Mary, by the appellee, import more than that the money came to his hands in pursuance of an arrangement of all the parties interested, to be held in lieu of the slaves, subject to the life-estate of Elizabeth Roberts, and the ultimate rights of the devisees in remainder under the will of Hugh Roberts, deceased; and that he so held it, notwithstanding the desire of some of the devisees that he should distribute it among them during the life of Elizabeth Roberts.

We are, therefore, of the opinion that the court erred in adjudging the claim for the proceeds of the slaves, Joe, Milly, and Mary, to be barred by limitation. But as to the balance of the price of the slave Brice, the sums admitted to have been received by the appellant and others, of the money derived by the sale of Brice, seem to have been in satisfaction of their interest in that fund, and we perceive no sufficient reason for disregarding the adjustment which was made by the parties themselves of that transaction. We are of the opinion also, that as Elizabeth Roberts was during her life entitled to the use of the proceeds of the other slaves, her transfer to the appellee operated to relieve him from responsibility for the interest accrued during her life which he may have received on the original fund of \$1,225.

But for the error indicated the judgment as to the appellant is reversed, and the cause remanded for a judgment in conformity to the principles of this opinion.

(a) *Kane v. Bloodgood*, 7 Johnson's Ch. 90: The statute of limitations is a good plea in equity, as well as at law. Those trusts which are mere creatures of a court of equity, and not within the cognizance of a court of law, are not within the statute of limitations. As long as there is a continuing and subsisting trust, acknowledged or acted upon by the parties, the statute does not apply; but if the trustee denies the right of his *cestui que trust*, and the possession of the party becomes *adverse*, lapse of time, from that period, may constitute a bar in equity; but other trusts, which are the ground of an action at law, are not exempted from the operation of the statute. Where the plaintiff is entitled to dividends on shares in an incorporated company, and for which he has a clear remedy at law, it is not such an express and direct trust as will take the case out of the statute.

HEMPHILL, *et al*, v. LEWIS.

[*Decided at the Summer term, 1870, of the Court of Appeals of Kentucky, Chief Justice GEORGE ROBERTSON delivering the opinion of the Court. Reported in 7 Bush, 214.*]

APPEAL FROM JESSAMINE CIRCUIT COURT.

When the law intrusts the estate of an infant to the care and protection of a guardian, the fiduciary undertakes to be vigilant, faithful, and competent. These elements of qualification imply as much knowledge of law as may be necessary for safety; this, however procured, he assumes to possess and properly exercise.

A second guardian sued the former guardian of his ward to recover estate of his ward in his hands, and being erroneously advised that such demand was a preferred claim against such former guardian's estate, he did not sue the surety of the former guardian. The debt was lost because the suit was not prosecuted in due time against the surety. The second guardian is held responsible for the loss.

Fiduciary demands have priority only against the estates of dead persons.

In a proceeding against heirs, a personal judgment against the husband of an heir is wrong when the record does not show why the husband should be held responsible.

F. K. Hunt and Beck & Messick, for appellants. *J. S. Bronaugh*, for appellee.

CHIEF JUSTICE ROBERTSON delivered the opinion of the Court: Richard H. Ferguson, who was indebted as guardian to his ward, Joseph C. Lewis, nearly fifteen hundred dollars, in 1858, made an assignment of his whole estate in trust to pay all his debts, without discrimination as to character.

At the instance of James H. Lowry, his substituted surety, Ferguson was removed as guardian, and Andrew Hemphill was chosen by the ward as his guardian. Hemphill lost no time in initiating proceedings for the collection of his ward's claim out of the trust estate. But, relying with apparent confidence on his ability thus to make the debt out of the principal debtor, he did not then sue Lowry as his surety, but made himself a party to a suit then pending for selling the trust property, and sought payment out of the proceeds, considering his ward's claim a preferred debt, which on that hypothesis was perfectly secure.

The Circuit Court lulled him in this delusion by requiring the master to report preferred debts, and by the report of this as such debt, and that the proceeds of sale greatly exceeded the amount of it. But as it was not a demand against a dead man, and moreover as the claim was asserted in the suit for distributing Ferguson's estate according to the trust among all the creditors *pro rata*, the court, in afterward decreeing distribution, adjudged rightly that Hemphill's ward was entitled to no preference; and the fund being insufficient to pay all Ferguson's creditors, his distributive share, as allotted and paid, left a large balance unpaid. When this was ascertained, in 1860-61, the balance could have been undoubtedly made out of Lowry, who owned a very large estate; but judgment obtained against him before the March term, 1862, unexpectedly exhausted it, so as to leave no property to levy on under a judgment obtained against him by the ward in an action brought to the March term, 1862.

Hemphill having died, this suit was brought by the appellant to recover from his executors and heirs the unsatisfied balance; and on the pleadings and proofs the Circuit Court rendered a personal judgment against the defendants, including the husbands of two of the female heirs. That is the judgment we are now to revise.

We are not allowed to doubt that Hemphill acted throughout in good faith as a fiduciary. We have reason to believe that, in pursuing the course he did, he followed the erroneous counsel of his professional adviser; and that, confiding in that advice, and feeling sure that in that way he would certainly make the debt without troubling the surety, he did what he considered best for all parties. We are also satisfied that, had he sued the surety at or before the Fall term, 1861, he would have made the debt; and we will not doubt that he would have done this had he been sooner undeceived as to the fatal assurance of full success in the chancery suit; for, although early in 1861, while he and other vigilant creditors had confidence in Lowry's ability to pay all his debts, yet he was known to be deeply involved, and his ultimate solvency was gravely questioned by many persons, as the multitude of suits against him, and other facts, prove.

Now, harsh as such a decision might seem to be against an honest and careful fiduciary, we are compelled to decide that beneficiaries, especially infants, should not suffer by the mistakes of their curators in law or in fact.

The judgment as to amount is therefore sustained by policy and inexorable justice.

In such a case the law, when it intrusts the estate of an incompetent infant to the care and protection of a guardian, the fiduciary undertakes to be vigilant, faithful, and competent; and these elements of qualification imply as much knowledge of law as may be necessary for safety. This, however procured, he assumes to possess and properly exercise. And in this case, therefore, it is more reasonable and just that the guardian, who was deceived as to the best remedy, should lose what a correct knowledge of the only apt procedure might have saved, than the passive and confiding infant should suffer (a).

But the judgment is wrong in form. The record does not show why the husbands should be held responsible. And as to the heirs, some amendment or further proceeding is necessary to sustain a personal judgment against them.

Wherefore the judgment, though right in principle, is nevertheless erroneous in detail, and is therefore reversed, and the cause remanded for further proceedings.

(a) See the case following, *Miller v. Chaplin*, taken from 20 Ohio State, 442, wherein the wholesome rule of equity is greatly relaxed, if not entirely disregarded by the majority of the court. Indeed, the dissenting opinion of Judge M'ILVAINE will hereafter stand as the law of that case, unless the present tendency to looseness eventually overrides all the safer and conservative principles of law and equity in regard to trusts. The healthy tone that prevails in the opinion of the veteran Kentucky justice, is wanting in that of Judge WELCH, in the Ohio decision. And if the rule is to be relaxed in favor of ignorance of the law, it would appear somewhat strange that the beginning should be in favor of those upon whom the rule should be the most stringent—those who are acting for others.

As heretofore stated, this Ohio decision is not produced here as an authority, but the better to illustrate the true rule, by bringing it into contact with the correct principles of equity embraced in the Kentucky decision.

SARAH MILLER, *et al*, v. EXECUTORS OF JOHN CHAPLIN,
deceased.

[Decided at the December term, 1870, of the Supreme Court of Ohio,
Judge JOHN WELCH delivering the opinion. Reported in 20 Ohio St. 442.]

1. Where trustees act within the scope of their authority, and exercise such prudence, care, and diligence as men of prudence, care, and diligence manifest in like matters of their own, they should not be held accountable for losses happening from their management of the trust funds.
2. Where executors are directed by will to put money at interest for a specified length of time, by deposit in bank or loan upon mortgage, they have a discretion to loan it for less periods than the whole time named, and to reloan it from time to time, and change the mortgage securities, as they may deem best for the parties interested.
3. In such case, if the executors are at fault in taking insufficient security for the loan, but subsequently procure the borrower to substitute therefor other security deemed by them sufficient, and such as they would have been justified in taking upon the original loan, they will not be held accountable for a loss happening through unforeseen defects in the latter security, merely because of their default in taking the former.
4. A mortgage executed by an individual member of a firm, upon land the legal title to which is vested in him, but which is in fact owned and used by the firm as partnership property, is "real estate" security, within the meaning of a clause in the will directing such security to be taken for money loaned.
5. The maxim that every person is presumed to know the law, is not always applicable to trustees; on the contrary, they may be exonerated from losses resulting from their ignorance of the law, in cases where they exercise proper diligence and precaution, and act upon the advice of counsel.

ERROR to the Court of Common Pleas of Lawrence County.
Reserved in the District Court. The case is stated in the
opinion of the Court.

W. W. Johnson, Simeon Nash, and John L. George, for
plaintiffs in error. O. F. Moore and E. V. Dean, for defendants
in error.

WELCH, J.: The defendants, who were executors of the last
will and testament of John Chaplin, deceased, and also testa-
mentary guardians of the minor legatees, were directed by the
will to put at interest certain moneys of the estate, either by
deposit in a bank, or by loan, "well secured by mortgage on

real estate," until the youngest legatee should become of age, covering a period of some fourteen years.

The money came to the hands of the executors in three several parcels, and was loaned by them to one Rogers, upon three several mortgages on real estate. These mortgages were sufficient security for the money, except that in one of them there was a mistake in the description of the mortgaged property, which mistake, however, could and would readily have been corrected had it been discovered. Each of these loans ran for one year only. After the maturity of one of the loans, and while the other two still remained undue, at the request of Rogers, and to accommodate him, the executors released these mortgages and canceled the mortgage notes, taking from Rogers a new note for the entire sum, which he secured by a mortgage on other real estate, called in the proceeding the "Hepler mortgage." The property covered by this latter mortgage was insufficient in value to secure the amount loaned, and was, moreover, subject to a prior mortgage, a fact which the executors failed to ascertain, having omitted to examine the records for that purpose. Upon discovery of the insufficiency of the Hepler mortgage, the executors made an arrangement with Rogers, by which they released the same, and again took a new mortgage. This last mortgage was upon Rogers's undivided half of a certain mill-lot, with a mill erected thereon, which was at the time owned and used by Rogers and his brother as partners in the milling business, but the title to which stood upon the record as that of tenants in common. The property thus mortgaged was sufficient in value to secure the loan; and Rogers himself, as well as the firm of Rogers and Brother, was solvent and good for the debt. In taking the mill mortgage, the executors, who were not learned in the law, exercised their best judgment, and acted in good faith, under the advice of counsel. Their counsel was a lawyer in good standing in his profession. He testifies that he had long resided in the town where the mill is situate, and was acquainted with property there, and with the Rogerses, and that he advised the executors that the security was good. He also testifies that the executors were "very cautious, and took a great deal of pains to get the very best security." It is true, that he says his opinion was not asked as to

the liability of the property for debts of the partnership. He probably knew the fact that it was partnership property. If he did not, the executors probably did not, for they were non-residents of the town. The truth seems to be, that the rule of equity which subjects such property to the payment of partnership liabilities, was utterly unknown to the executors, and if known to their attorney, did not occur to him at the time.

Subsequently, the firm of Rogers and Brother proving to be insolvent, an action was brought by the executors to foreclose the mortgage. To this action the creditors of the firm of Rogers and Brother were made parties, and the mill property was by decree of court subjected to the payment of partnership debts, for which it proved insufficient, and Rogers being insolvent, the mortgage debt was lost.

After bringing their action upon the mortgage, the executors were offered, in security of the loan, the note of a third person, which was in fact secured by mortgage (the executors, however, not being informed that it was so secured), on condition that they would release the mortgage upon the mill property. Under the advice of their said attorney, they refused this offer. Had they accepted it, the debt would have been saved. They refused the offer in good faith, and in the belief that the mill mortgage was good, or at least was better than the security so offered.

In their account filed in the Probate Court for final settlement, the executors credited themselves with the amount of this loss, being, with the interest, some \$6,000. To this item in the account the legatees, the present plaintiffs in error, excepted. The exception was overruled by the Probate Court, and the cause appealed to the Common Pleas, where a like judgment was entered. To reverse the judgment of the Common Pleas, a petition in error was prosecuted by the legatees in the District Court, and the cause was there reserved for decision here.

The case presents the single question, whether the executors have been guilty of a breach of trust. In other words, have they acted within the scope of their authority, and exercised such prudence, care, and diligence in the management of this fund, as men of ordinary diligence, care, and prudence manifest in like matters of their own? If they have not, then the

loss should fall upon them; otherwise it should be borne, as losses generally are, by the owners of the fund.

It is claimed, in the first place, that the executors rendered themselves *absolutely* liable to account for the fund, by their release of the first three mortgages, which were amply sufficient security, and also by taking the Hepler mortgage without ascertaining the true value of the property, or the existence of a prior mortgage upon the property; and that, however fully and well they may have discharged their duty in taking the final mortgage upon the mill property, this will not discharge them from their liability.

The answer to this claim, it seems to us, is, that the will prescribes no limits as to the length of time for which any loan should run, but intrusts to the executors a discretion to loan it for longer or shorter periods, and to collect and reloan it, as they might deem proper. They had a right at any time, either before or after the money became due, to receive payment of it from Rogers, and reloan it to him upon new securities, or, which would seem to be in effect the same thing, to substitute new securities for the old ones. The final loan upon the mill mortgage must, therefore, be looked upon in the light of an original loan. Had the executors made no loan of the money at all, but kept it in their own hands, down to the date of the mill mortgage, surely the loan upon that mortgage, if well and judiciously made, would have discharged them from all loss happening therefrom without their fault; and yet in that case their prior breach of trust, in failing to loan the money at all, would have been at least as great, and as undeniable, as in the present case.

But it is said, even if the mill mortgage is to be considered as an original transaction, that the executors were guilty of a breach of trust in taking it, first, because the mill property was not "real estate," and, therefore, not within the scope of their authority; and, secondly, being partnership property, and as such liable primarily to the satisfaction of partnership debts, the security was insufficient, and such as no prudent man would accept.

We are clear in the opinion that the first of these positions is not well taken. Real property, the title to which is vested in the members of a firm, but which is in fact owned and used by

the firm as partnership property, though regarded in equity as part of the assets of the concern, and as such subject to some of the incidents of personal property, is nevertheless in law real estate, and can only be mortgaged or conveyed as such. A mortgage upon such property is not a mortgage upon personal property, but upon real estate.

The second position assumed involves more of difficulty. If the executors, at the time of taking the mortgage upon the mill property, were aware that it was in fact owned and used by the firm as partnership property, and were also aware of the law which holds it liable, like other partnership assets, to the payment of partnership debts, to the exclusion of the individual debts of the members of the firm, they were clearly guilty of a breach of trust in taking the mortgage. That they were aware of the fact that the mill property was owned and used as partnership property, they are estopped to deny. This is so, because otherwise they would have been innocent purchasers without notice, and no decree could have been properly rendered against them, and in favor of the partnership creditors, in their action to foreclose the mortgage. That decree estops them, not only from denying its truth, but also from denying any fact upon which it necessarily rests. We are bound to assume, therefore, that the executors acted with a knowledge that this was partnership property. It is manifest, however, that they acted in utter ignorance of the law—or, rather, the rule of equity—by which such property is subjected, as personal assets, to the payment of partnership debts, to the exclusion of liens created thereon by the individual members of the firm. It is admitted that they acted in good faith, and exercised their best judgment. They followed the advice of their counsel, a lawyer of large practice and long experience, and who stood high in his profession. Would it be just, under such circumstances, to hold them accountable for their ignorance of this recondite and, I might even say, doubtful principle of law—a principle which, though established as law in Ohio, is said to be denied in some other States? It never occurred to their counsel to suggest the existence of any such rule of law. How could we expect it would occur to the executors, who were unlearned in the law? The evidence shows that the executors consulted many business persons,

as to the propriety and safety of taking the proposed security, yet no one suggested any difficulty or objection on the ground that the mill was partnership property. In all probability, had the testator himself, or the legatees themselves, been consulted, under the same circumstances they would have fallen into the same mistake. Is it just, then, to hold the executors responsible for this loss? Are they guilty of a breach of trust, a betrayal of the confidence reposed in them by the testator? A majority of the Court think not. It seems to us, that in taking this last mortgage, the executors acted up to the standard observed by men of ordinary prudence and sagacity.

As to the refusal of the executors to release the mill mortgage, and take in lieu thereof the promissory note of a third person, secured by mortgage, it is enough to say that they were not informed of the fact that it was so secured, and that in refusing to accede to the offer they followed the advice of their counsel.

A majority of the Court are unable to see any error in the judgment of the Court of Common Pleas. JUDGMENT AFFIRMED.

SCOTT, C. J., and DAY, J., concurred.

WHITE, J., being of opinion that, on the facts of the case, the judgment ought to be reversed, dissented.

M'ILVAINE, J., dissenting: For the third proposition in the foregoing syllabus I would like to substitute the following:

3. In such case, if a loan is made for a less time than the whole period, and the same is "well secured by mortgage upon real estate," as directed by the will, the executors have no authority, before maturity, to change such securities for the mere accommodation of the borrower, and without any intent or purpose to benefit the trust estate; and if such change is made, without the assent of the beneficiaries, the executors assume the risk of any loss resulting therefrom.

And in my opinion the fifth proposition of the syllabus ought to be modified so as to read as follows:

5. The maxim that every man is presumed to know the law, applies to trustees; but they may be exonerated from losses resulting from their ignorance of the law, in cases where they exercise proper diligence and precaution, and act upon the advice of counsel, provided the counsel is fully informed as to the facts material to the question or subject-matter upon which his legal opinion is taken.

The facts deducible from the testimony set out in the record of this case, are stated (with the exceptions hereinafter men-

tioned) in the opinion of the Court. These facts, in my judgment, show, at least, two distinct violations of duty on the part of the defendants, either of which renders them personally liable to the plaintiffs to account for the lost fund, namely :

1. The exchanging of the mortgages first taken—which were undoubted securities for the loans made—for the “Hepler mortgage,” solely for the accommodation of the borrower, and without the assent of the beneficiaries.

2. The cancellation of the Hepler mortgage, and acceptance of the “mill mortgage” as the sole security for the money loaned.

I admit that trustees, in all cases, may, and should, change securities when the interest of the trust estate requires it, or where it is reasonably believed that the change will be beneficial to the estate. But I deny that trustees, in any case (without the assent of the beneficiaries), may change securities for the mere accommodation of the debtor, and without any intent or purpose to benefit the estate. All unnecessary intermeddling with good securities ought and does impose the *risk* upon the intermeddler. That such is the rule, where the securities (other than personal securities) come into the hands of the trustees directly from the founder of the trust, is not doubted. And that this rule applies in such cases, even though the declaration of trust contains express authority to change securities, has been frequently held. See *Tiffany and Bullard on Trusts, etc.*, 615, and cases cited.

If express authority, in such cases, to change securities can not be exercised unless the interest of the trust fund requires it, I can see no reason why good securities taken by trustees upon their own investment should be the subject of a less prudent rule. “Let well enough alone,” is a maxim of common prudence, *Tiffany and Bullard*, 615, and cases cited.

In surrendering those good securities first taken, for the mere accommodation of Rogers, the defendants assumed the risk; and inasmuch as the fund has been lost, a liability has been incurred by them to account to the plaintiffs for the lost fund; and this liability has not been, and could not have been, wiped out by any subsequent but ineffectual effort on their part to secure the loan in accordance with the directions of the will of Chaplin.

What I claim is this: Where a liability has been incurred by trustees by reason of their fault in giving up good securities for insufficient ones, *that liability* becomes a security in the hands of the beneficiaries, to which they have a right to look in the event of a loss. And all subsequent efforts on the part of the trustees to obtain "better or additional security," is to be regarded as efforts made for their own indemnity.

I admit that if the loan had afterward been called in, the liability would have ceased, for the reason that no loss resulted from the default; but such is not this case, as I understand it. The loan to Rogers never was called in; no new investment was made, or pretended to be made. The first change of securities was made solely for the accommodation of Rogers, because he wanted "his own property to be clear," and the second was made for the sole purpose of "getting better security" for the old note.

Again, in their subsequent efforts to obtain "better security" the defendants did not stand in the same relation to the fund as in the first instance. They had no choice as between borrowers—that important opportunity for the exercise of discretion was lost—the fund was out. All they could do at that time, was to take such "better security" as they could get. And although the better security offered to them might have *appeared* good enough, yet who can say it would have been accepted if the money had been in their possession?

It is impossible for me to see how trustees, who have violated their duty in making or managing an investment, whereby the foundation of a liability has become fixed, can afterward, and touching the same investment, be regarded, in equity, with as much favor as though every duty had been faithfully performed.

As to the question whether this investment was lost by reason of the first change in the securities, I have but two remarks to make: 1. The investment was not at any subsequent time "well secured" by mortgage on real estate; and, 2. If the defendants had not canceled these first mortgages for the mere accommodation of a "dashing business man," these plaintiffs would not have lost their patrimony.

If, however, the defendants can not be held to account by

reason of their first default, because of the subsequent transaction in obtaining the mill mortgage, I still hold that there was no such care and diligence in that transaction as common prudence requires. If that transaction had been a reinvestment of the fund, it ought not to have been made. A man of ordinary prudence, knowing the law (and he is presumed to know it), would not have accepted a mortgage on a moiety of property held in common, which at the time was in the use of a copartnership composed of the tenants in common, without first inquiring as to the conditions upon which the title was held by members of the firm, and as to the indebtedness of the firm. Had such inquiry been made, the defendants would have come to the knowledge that the common estate was partnership property, and that the debts of the firm were largely in excess of all its assets, and that the mortgage by a copartner in an insolvent firm, upon firm property, for his individual debt, was utterly worthless as a security.

It is no answer to this charge of negligence to say, that the defendants had the fullest confidence in the pecuniary responsibility of the borrower, and that his reputation in that regard was "as good as any man in the county." They were not authorized to look to the pecuniary responsibility of Rogers; the will of Chaplin directed that the loan should be "well secured by mortgage on real estate."

Nor will it do to say that this last security was accepted under the advice of counsel, until, at least, it is shown that all the material facts of the case were made known to counsel, which was not so in this case, unless it be inferred from the testimony tending to show that the counsel who gave the advice lived in the neighborhood, knew the property, and was well acquainted with the parties. But I think such inference can not be fairly drawn from such circumstances, in the face of the testimony of Colonel Nigh (the counsel referred to, and the only testimony upon this point), who testified as follows: "All the legal advice I gave them [the executors] was, that the title was in the name of H. C. & R. E. Rogers, jointly; and that there were no liens so far as we could learn from the records." And on cross-examination Colonel Nigh said: "I was not called on by Proctor and Anderson, in taking the mill mortgage, to ascertain

how much Henry C. Rogers, or the firm of H. C. Rogers & Co., was in debt. They did not inquire about whether the partnership debts of H. C. Rogers & Co. would come in ahead of their mortgage. They did not ask my opinion on that."

In either view of this case, the defendants ought to be held to account.

DRURY v. CROSS.

[Decided at the December term, 1868, of the Supreme Court of the United States, Associate Justice DAVID DAVIS delivering the opinion. Reported in 7 Wallace, 299.]

A sale, far below value, of a railroad, with its franchises, rolling stock, etc., under a decree of foreclosure, set aside as fraudulent against creditors; the sale having been made under a scheme between the directors of the road and the purchasers, by which the directors escaped liability on indorsements which they had made for the railroad company. And the purchasers held to be trustees to the creditors complainant, for the full value of the property purchased, less a sum which the purchasers had actually paid for a large lien claim, presented as for its apparent amount, but which they had bought at a large discount. Interest on the balance, from the day of purchase to the day of final decree in the suit, to be added.

But because the full value of the property sold was not shown with sufficient certainty, the case was sent back for ascertainment of it by a master.

APPEAL from the Circuit Court for Wisconsin.

The case was this: Bailey & Co., of Liverpool, England, held notes against the Milwaukee and Superior Railroad Company, indorsed by four of its directors, for about \$21,000 (the price of iron furnished to lay the road), and as collateral security for payment, \$42,000 in mortgage bonds of the road. Two hundred and eighty thousand dollars in similar bonds, but which had never been *issued*, were sealed up and deposited with M. K. Jesup & Co., *not to be issued* until the debt to Bailey & Co. was paid, and twenty-seven miles of the road were built. The company was managed by a board of seven directors, of whom four made a quorum.

The company having made about five miles of the road, became thoroughly insolvent, and abandoned their enterprise.

Bailey & Co., being unpaid, and not being willing to trust to and proceed on their mortgage, brought actions against the four directors on their indorsement. These, desirous to throw the debt on the company, where it belonged, procured, at their own expense and risk, a suit to be commenced to foreclose the mortgage, so that they could make their debt out of the collaterals in their hands. In this suit certain bonds issued to the city of Milwaukee, and the \$42,000 of bonds held by Bailey & Co., were spoken of; but no mention was made of the \$280,000 of bonds deposited with Jesup & Co., and no relief asked in relation to them. On the 19th of March, 1859, the bill was taken as confessed, decree rendered, and the case referred to the master to compute and report the amount that was due.

Prior to the decree, in consequence of negotiations between the directors and Cross, Luddington and Scott (Cross & Co.), an arrangement was made by which these persons were to purchase the claim of Bailey, and protect the directors from their indorsement. The directors, on their part, were to aid Cross & Co. to acquire the entire property of the road.

In furtherance of this plan, the \$280,000 of bonds in the hands of Jesup & Co. were delivered, by resolution of the Board of Directors, to Bailey & Co., as additional security for their claim. Bailey & Co. did not ask for further security, and refused, at first, to receive these bonds, and, in fact, did not receive them until they had sold their claim, with their collaterals, to Cross & Co. This was after the decree in the foreclosure suit. Cross & Co., having thus got possession of \$322,000 in bonds, transferred by Bailey & Co., as collaterals, in order, as they said, to become the absolute owners of them, sold them, with consent of the railroad corporation, at the Exchange in Milwaukee, on five days' notice; bought them for a small sum of money; produced them before the master, who allowed them as a lien on the road, and the final decree in the foreclosure suit was rendered upon the said \$322,000 bonds, and no others.

The sum paid by Cross & Co. to Bailey & Co., for all the judgments obtained, was \$13,380.20.

Under the decree of foreclosure, the entire railroad, its franchises, rolling stock (two locomotives and tenders, with ten platform cars), and fixtures, were sold, in August, 1859, to Cross &

Co., for \$20,100. The iron tracks, which were now torn up, same evidence showed, had been sold for \$22,500. The locomotives (little used) had cost \$18,000; the cars, about \$5,000. The company, it was said, had paid between \$15,000 and \$20,000 for their right of way. There were also railroad chairs, spikes, ties, some fences, etc.; the value not being exactly shown.

In this state of things, Drury & Page having obtained judgment for \$21,634 against the railroad company for locomotives sold to it, filed a bill in chancery in the court below against the company, Cross, and his copurchasers, alleging that the sale was fraudulent, and seeking to reach the franchises and property of the company, sold to Cross & Co. under the decree of foreclosure. The court below dismissed the bill as to Cross and his copurchasers; and from this decree of dismissal the present appeal came.

Mr. *M. H. Carpenter*, for the appellants. Mr. *Palmer*, for the appellee.

Mr. Justice DAVIS delivered the opinion of the Court: The transaction which this case discloses can not be sustained by a court of equity. The conduct of the directors of this railroad corporation was very discreditable, and without authority of law. It was their duty to administer the important matters committed to their charge, for the mutual benefit of all parties interested, and in securing an advantage to themselves, not common to the other creditors, they were guilty of a plain breach of trust (a). To be relieved from their indorsement, they were willing to sacrifice the whole property of the road. Bound to execute the responsible duties intrusted to their management, with absolute fidelity to both creditors and stockholders, they, nevertheless, acted with reckless disregard of the rights of creditors as meritorious as those whose paper they had indorsed. If Bailey & Co. had sold iron to build the road, so had the Boston association sold locomotives to run it. It is not easy to see why the corpo-

(a) See preceding case of *Goodin v. Whitewater Canal Company*, page 125, which is a confirmation of the doctrines above enunciated. The case of *Murrey v. Vanderbilt*, preceding, page 103, is to the contrary. See, also, notes on pages 110 and 111.

ration should exhaust its effects to pay one, and leave the other unpaid. But, it is said, the directors, being unable to pay both, had the right to choose between them. We do not deny that a debtor has a legal right to prefer one creditor over another, when the transaction is *bona fide*; but this is, in no just sense, a case of preference between creditors. If the law permits the debtor, in failing circumstances, to make choice of the persons he will pay, it denies him the right, in doing it, to contrive that the unpreferred creditor shall never be paid. In other words, the law condemns any plan in the disposition of the property which necessarily accomplishes a fraudulent result.

That the plan adopted by the directors of the railroad to dispose of its property to Cross & Co. was a fraudulent contrivance, and necessarily, if executed, accomplished a fraudulent result, is too plain for controversy. At the time this scheme was initiated, there were only five miles of track laid, the company hopelessly insolvent, and the enterprise abandoned. In this condition of things, the directors were sued on their indorsement, and, as was natural, manifested an anxiety to have the property of the company pay the debt for which they were liable. But Bailey & Co. preferred not to enforce their mortgage lien, and only consented to allow it to be done, on being indemnified against the risk and expense of the suit. The directors, in furnishing them this indemnity, in order to procure the enforcement of the mortgage lien to the extent of \$42,000, which in their hands was a just debt against the company, were guilty of no wrong. But the departure from right conduct, on their part, commenced at this point. Notwithstanding they had the control of the foreclosure suit, they were not content to let it proceed to decree and sale without they were, *in advance*, relieved of personal responsibility. Bailey & Co. would not release them, and they endeavored to find some person who would purchase the Bailey claim, with its collaterals, and discharge them from liability on their notes. This would have been well enough, if the scheme had embraced only the \$42,000 bonds held as collaterals, which the company justly owed, and the foreclosure suit was brought to enforce. But the scheme went much further; for these directors, who controlled the corporation, in their selfish desire to save themselves at the expense of their own reputation

and the rights of creditors, were willing to use the means at their command to swell the indebtedness of the road beyond its true amount, in order to aid more effectually Cross and his associates to acquire all the property of the company.

If Cross & Co. had been satisfied with the transfer of the \$42,000 bonds, which constituted the true indebtedness against the road, in the hands of Bailey & Co., the transaction on their part would have been free from censure; but the certain attainment of the object they had in view required more bonds. It was very clear that bidders might appear, if the road was to be sold for no more than the face of these bonds, while they would be deterred from attending a sale where the sum to be made was over \$300,000. To bring the decree, therefore, up to a point at which competition would be silenced, it became necessary to use the bonds in the hands of Jesup & Co. Two hundred and eighty thousand dollars in the bonds of an insolvent corporation—constituting no indebtedness against it—are thrust, unasked, into the hands of creditors, for the ostensible purpose of furnishing them additional security, when, *at the time*, they were negotiating a sale of the debt to be secured for \$7,000 less than its face. But the transfer to Bailey & Co. was a mere pretense. To preserve a semblance of fairness in the business, the bonds had to come through Bailey & Co., but the real purpose was not to help them, but to aid Cross and his associates to absorb the whole road—and this these directors were willing to do—when the debt they were struggling to escape could be paid for \$13,380.20, and the very iron in the road-bed, for which the debt was incurred, was worth over \$20,000.

It is claimed that the sale at the Milwaukee Exchange, assented to by the corporation, conferred rights on the purchasers of the bonds which can not be successfully attacked; but this claim is based on the idea that the sale was for an honest purpose, when, in fact, it was only part of a previously concerted plan to accomplish a fraudulent purpose. The ceremony of this sale was a cheap way of showing honesty and fairness, for it was very evident that an advertisement to sell a large amount of the bonds (having no market value) of an insolvent and abandoned railroad corporation would never attract the attention of capitalists.

The scheme to acquire the property of this corporation was, in its inception, fraudulent, and every step in the progress of its execution was necessarily stamped with the same character. There is nothing in this record to mitigate the conduct of the defendants, who purchased the Milwaukee and Superior Railroad. They knew the road was abandoned, the company insolvent, the complainants unpaid for property then in the possession of the corporation, and yet they combine with timid and unfaithful trustees to get not only *this*, but all the property of the corporation, and adopted a plan to carry out their project, which resulted in raising the decree to an extent that would necessarily prevent all fair competition. The fruits of such an adventure can not be enjoyed by the parties concerned in it.

There are other features in this case which provoke comments, but we forbear to make them.

Cross, Luddington, and Scott purchased the entire railroad, locomotives, cars, and franchises of the company, for about \$20,000. Subsequent to the sale, they stripped the road-bed of iron, ties, spikes, and chairs, which, with the locomotives, cars, and fencing, they sold to various parties, and realized from the sales a large sum of money; but how much, the evidence is so singularly loose that we are unable to tell. On account of the want of certainty on this point, the case will have to be sent back, and referred to a master to take proofs, who will also ascertain and report the value (if there be any) of the franchises of the company which Cross & Co. still retain.

Cross, Luddington, and Scott must be held liable as trustees to the complainants for the full value of the property they purchased on the sale of the road, after deducting the amount due at the day of sale on the Bailey judgments against the directors, which amount they will be allowed to retain.

They must also be charged with interest on the balance found due the complainants, from the day of the sale to the day of the final decree in this suit.

The DECREE of the Circuit Court is REVERSED, and the cause remanded, with directions to proceed in CONFORMITY WITH THIS OPINION.

WASHINGTON, ALEXANDRIA AND GEORGETOWN RAILROAD CO.
v. ALEXANDRIA AND WASHINGTON RAILROAD CO., *et als.*

[Decided at the January term, 1870, of Virginia Military Court of Appeals (a), HORACE B. BURNHAM, O. M. DORMAN, and W. WILLOUGHBY, Judges, the latter delivering the opinion of the Court. Reported in 19 Gratton, 592.]

A corporation being a defendant to a suit in equity, which seeks to have it declared null, the holders of stock in it are not proper parties to defend the suit.

In such a case, the holders of the stock claiming that if the corporation is annulled, they have equitable interests in the property, may be admitted as parties defendants to protect their interests (b).

(a) There is nothing in the report that explains the judicial status of this Court; but in the process of "reconstructing" the State, it was found necessary or proper at one time to commit the executive duties to a military governor, and these judges are supposed to have been commissioned during this interregnum. However that may be, the decision is based upon abundant authority; and there is little doubt but that substantial justice was done in the premises.

(b) *Bronson v. La Crosse and Milwaukee Railroad Company*, 2 Wallace, 283: Stockholders of a corporation, who have been allowed to put in answers in the name of a corporation, can not be regarded as answering for the corporation itself. In a special case, however, where there is an allegation that the directors fraudulently refused to attend to the interests of the corporation, a court of equity will, in its discretion, allow a stockholder to become a party defendant, for the purpose of protecting—from unfounded and illegal claims against the company—his own interest, and the interest of such other stockholders as choose to join him in the defense.

As to when stockholders can sue the directors or agents of the company, see *Coleman v. Eastern Counties Railway*, 10 Beavan, 1.

Marsh v. Eastern Railroad Company, 40 New Hampshire, 567, is a case by stockholders to restrain a breach of trust by the directory; and the rule by which they were permitted to sue is stated on page 567: "If the directors of a corporation refuse to prosecute, by collusion with those who had made themselves answerable by their negligence or fraud, or, if the corporation was still under the control of those who must be made defendants in the suit," the stockholders are permitted to sue.

It is now no longer doubted, either in England or the United States, that courts of equity in both have a jurisdiction over corporations, at the instance of one or more of their members, to apply preventive remedies in injunction, to restrain those who administer them from doing acts which would amount to a violation of charters, or to prevent any misapplication of their capital or profits which might result in lessening the dividends of stockholders or the value of

The plaintiff and defendant corporations being corporations of this State, the owners of the stock, though non-residents, are not entitled to have the cause removed to the United States Court, to have the question of the validity of the corporation decided.

The Alexandria and Washington Railroad Company make a deed on their property to secure certain bonds; and it provides that if the trustee becomes incapable of acting, any court of record of Alexandria County, upon the application of three-fifths of the holders of the bonds, upon notice to the president or any director of the company, may appoint another trustee. The trustee, president, and directors go into the enemy's lines, and remain there during the war. An order of the court of Alexandria County, substituting another person as trustee, without notice, is null and void; and a sale made by such substituted trustee is utterly null.

A trustee in a deed to secure debts, who is the attorney in fact and law of the creditor, can not make a valid sale at auction of the property to himself.

Where there are various incumbrances on property, and the priorities are not ascertained, a sale by a trustee under one of the deeds is improper.

Quere: Whether the act, Code, ed. of 1860, ch. 61, secs. 28, 29, applies to a sale by a trustee of a mere equity, conveying no legal title to the property of the corporation?

THE following statement of this case was prepared by Judge WILLOUGHBY:

The Alexandria and Washington Railroad Company was chartered in February, 1854, by the Legislature of Virginia, and was organized pursuant thereto; and James S. French was made president. In August, 1854, Congress passed an act authorizing said company to purchase and hold lands in the District of Columbia, and to lay a track through such streets as the corporate authorities of Washington might approve. In 1855, the authorities of Washington authorized the company to lay its track on Maryland Avenue, from the Long Bridge to the Baltimore Depot, and guaranteed their bonds of \$60,000 to assist the company in the construction of the road; for which, in April, 1855, the company executed a deed of trust to Joseph H. and A. T. Bradley, for the benefit of the corporation, on all the property of the company.

The track was laid from Alexandria to the Long Bridge, their shares, as either may be protected by the franchises of a corporation—if the acts intended to be done create what in law is denominated a breach of trust. And the jurisdiction extends to inquire into and to enjoin, as the case may require that to be done, any proceedings by individuals in whatever character they may profess to act, if the subject of complaint is an implied violation of a corporate franchise, or the denial of a right growing out of it, for which there is not an adequate remedy at law, *Ib.* citing *Dodge v. Wolsey*, 18 Howard, 341.

and on Maryland Avenue, and cars and engines were obtained, and the road operated until the Spring of 1861, up to the time of the breaking out of the war.

On the 31st of December, 1856, a second deed of trust was made upon the property of the company, to J. Louis Kinzer, trustee, to secure Fowle, Snowden & Company \$14,849.50, on which was paid \$8,348.14.

On the 16th of July, 1857, a third deed of trust was executed to Walter Lenox, trustee, to secure the payment of \$30,000 in coupon bonds, which the company had been authorized to issue by an act of the Legislature. These bonds were payable July 22, 1877, with interest semi-annually at seven per cent; and it was provided, that in default of payment of principal or interest, the road might be sold by giving at least sixty days' notice by publication in certain newspapers. The deed further provides as follows:

And it is mutually agreed, that in case of the death, incapacity, or resignation of the party of the second part (the trustee, Lenox), or of his successors in this trust, then the office of trustee filled by him shall become vacant, and such vacancy shall be filled by an appointment to be made by any court of record in the county of Alexandria, on the application of the parties of the first part, or of the holders of three-fifths of said bonds. Provided, however, in the last case, notice of the application of the parties making such request be given to the president or one of the directors of said company; and all the rights, powers, and authority hereby conferred on the original trustee shall then and there devolve upon and be invested in his successor or successors so appointed. This deed of trust in terms recognizes the first deed of trust of \$60,000 as an existing and prior lien.

These bonds were sold to Benjamin Thornton, of England, for \$10,000, upon which was paid \$2,000 in cash; and notes were given for the balance; upon which was afterward paid about \$3,500, making about \$5,500 paid in all; the balance still being due.

This company was authorized by its charter to issue stock to the amount of \$300,000, and issued stock only to the amount of \$200,000. There were various judgments and claims against

the company, making the amount of the indebtedness, together with the sums secured by said deeds of trust, including interest on the 10th of April, 1862, as reported by the commissioner, about \$195,000. Of these judgments, Alexander Hay claimed to be the owner of about \$40,000 in April, 1861; but it seems that on August 24, 1860, he had assigned these judgments, which had been obtained by him long before, to James S. French, upon the payment to him of \$5,000, though it does not appear that this \$5,000 has been paid. By power of attorney executed at the same time, he authorized said French to deal with such judgments in the same manner as if the same were his individual property.

On the occupation of the city of Alexandria by the United States troops, in May, 1861, the rolling stock of the company was transferred to the Orange and Alexandria Railroad, and taken beyond the Federal lines. The president, directors, and the trustee, Lenox, all went South at that time, and remained within the Confederate lines during the war; and the rolling stock was sold by said French to parties within said lines.

The United States Government took possession of the road in 1861, and laid the track with heavy rails, and put it in good order, and used it till the close of the war, having exclusive possession thereof during that period, and leaving the road in good order and very valuable.

It is claimed by Hay that he took possession of the road early in 1861, and made a contract with the Secretary of War, by which the War Department was to repair the road; and binding himself to defray the expenses of such repairs, which should not be discharged by the use of the road. The Government used the road long enough to pay its outlays upon the road, if the use thereof could be chargeable against the Government.

The defendant, Joseph B. Stewart, an attorney-at-law, acted as attorney for Alexander Hay, and during the year 1861, either as such attorney or on his own account, sold the iron of the company for something over \$10,000, and received the proceeds. No account has ever been made of this money by him, or by Mr. Hay.

On the 28th of January, 1862, Joseph Davison, who claimed

to be the agent of Benjamin Thornton for the coupon bonds said to be held by him, made an agreement with said Stewart, authorizing him as attorney to take such steps as might be necessary to close out and perfect the interest of said bondholders in and to said road, and agreeing to give him a contingent fee of one-half of the whole amount received on said bonds in the sale of the same, or of the said road, over and above the sum of \$10,000, and all the interest that the said bondholders, or any of them, may have paid, or may have to pay on the said \$30,000 of bonds, at the rate of seven per cent per annum; and on the next day, January 29th, said Stewart, as attorney in fact for said Hay, gave to said Davison an agreement in writing, that if a sale be made under said deed of trust, and the said road be purchased by himself or constituents, the said Thornton should have the right to continue his interest in the same according to the ratio of his present lien upon and demand against the same; and shall enjoy and receive a *pro rata* rate of all the appreciations of value or profits claimed from the future use or development of the same, and be created a stockholder accordingly.

On the 3d of February, 1862, Davison filed a petition in the County Court of Alexandria County, sworn to by him, stating that he is the attorney in fact of all the bondholders secured by the deed of trust to Walter Lenox, claiming that said trustee has become incapacitated from performing said trust; that he has made diligent search for the president, or some director or agent of said company, to whom he could give notice, but could find none upon whom notice could be served, and believed that they had abandoned the franchises of the road, and gone beyond the jurisdiction of the court, and asks that Joseph B. Stewart be appointed trustee.

Joseph Thornton also swears that he knows of his own knowledge that said Davison is the agent of said bondholder, Benjamin Thornton, and has authority to make the applications.

Upon these affidavits and application, the County Court make an order substituting Stewart as trustee in said deed of trust, in place of Walter Lenox, on the 3d day of February, 1862.

On the 4th day of February, 1862, Davison requested the trustee to make sale of said road, and thereupon, on the 10th

day of February, 1862, such sale was advertised to take place on the 10th day of April following, on which day it was sold at public auction, and bid off by Alexander Hay for the sum of \$12,500; and Hay having assigned one-half of his purchase to Joseph Thornton, and they having agreed to continue as a corporation under the name of the Washington, Alexandria, and Georgetown Railroad Company, conveyance was made to them, and to such company, of the road, and all the franchises and property of the Alexandria and Washington Company, by Stewart as trustee. On the 3d of May, 1862, the organization of the new company was perfected by the appointment of officers; the stock having been divided between Hay, Stewart, Davison, and Thornton, the same then being owned by them. On the 3d of March, 1863, Congress extended the charter of the old company, so as to allow it to occupy its present location on Maryland Avenue, in Washington, and to construct a bridge alongside of the Potomac Bridge upon certain conditions named in the act. This charter is claimed to have been obtained at the instance of members of the new company, but it does not appear, and is not explained why, *in terms*, it was granted to the "Alexandria and Washington Railroad Company."

By an act of the Alexandria Legislature, of January 23, 1864, the Washington, Alexandria, and Georgetown Company, which is therein declared to be a corporation, lawfully succeeding by purchase to the old company, is authorized to issue stock to the amount of \$500,000, to sell its bonds to the amount of \$200,000, in addition to the \$100,000 allowed to the old company, and to borrow money upon its promissory notes to the amount of \$100,000 more. With the proceeds of such stock, bonds, and notes, it is claimed by the defendants that a large portion of the indebtedness of the old company was paid; money was raised to procure the charter from Congress, to build the bridge, repair and put the road in good order; and such stock is now held by various parties in Washington, New York, and Baltimore.

The bill, which was filed in April, 1866, by James S. French as president of the Alexandria and Washington Railroad Company against the new company, charges, among other things, that the appointment of J. B. Stewart as trustee was, for many

reasons alleged therein, null and void; and that the sale by him was consequently without authority; and that all the action of himself, Hay, Thornton, and Davison, was the result of a fraudulent conspiracy on their part to obtain the road unlawfully; and that this, together with the conduct of said Stewart in making such sale, ought to make the sale void.

The answers were filed, accounts taken by the commissioner and filed, and various other proceedings had, up to the 22d of November, 1867, when Coleman, Riddle, and others, filed a petition representing that they were the owners of a large majority of the stock of the new company, and as such were deeply interested in the contest between the said companies, and asked that they be made parties defendants; which was allowed.

On the 23d day of December, 1867, a decree was made adjudging that "the whole proceeding of the County Court of Alexandria County, at its February term, 1862, substituting Joseph B. Stewart as trustee in place of Walter Lenox, under the deed of trust of the 16th of July, 1857, was without authority of law, and null and void; and that all the subsequent proceedings of the said Stewart under said deed, his sale of the said road and its franchises to Alexander Hay, and the incorporation of the said Washington, Alexandria, and Georgetown Railroad Company growing out of the said sale, are null and void, and that the same should be set aside and annulled." By the same decree a reference was made to the commissioner to inquire into the interests of said Coleman and others, and make further report to the court.

On the 2d of June, 1866, a petition was filed by the new company, alleging that the corporation was the only party having any real interest in the suit, except Joseph B. Stewart; that Hay was a citizen of Pennsylvania, and Stewart a citizen of Kentucky; and on the same day a petition was filed by said Stewart, alleging that he was a citizen of Kentucky; that the company was made a defendant for the purpose of preventing a removal of the same into the United States Court; and upon said petitions motion was made by the petitioners to remove the cause into the Circuit Court of the United States. This motion was overruled. On the 6th of December, 1866, this motion was

renewed by Stewart and Hay, each alleging their citizenship of another State; which was also denied.

In May, 1868, two petitions for removal to the United States Court were filed by said Coleman and others, each alleging their citizenship of Maryland and other States; one claiming that the validity of orders made by the Secretary of War and other military officers in relation to said road, was involved in the suit; and the others, that they, holding the majority of the stock of the new company, the existence of which, as a company, was denied by the bill, were the substantial parties defendants, and alleging that from prejudice and local influence they did not believe they would be able to obtain justice in the State courts. They also filed their answers at the same term. The motion upon these petitions was denied at the August term of 1868, and then, against the protest of Coleman and others, who claimed that they had had no opportunity to take testimony, a decree was made again declaring said order of the County Court and the said bill null and void; and it appearing that large liabilities had been incurred by the old and the new companies, that, under the authority to issue stocks and bonds to a limited amount, a large amount had been issued in excess of said authority, which have been sold, and are now in the hands of purchasers thereof, a reference was ordered to ascertain what equities might exist growing out of said transactions. From this decree an appeal has been taken to this Court.

R. J. Brent, Jno. L. Brent, and Dulaney, for the appellants.
G. W. Brent, Bradley & Gilmer, for the appellees.

WILLOUGHBY, J.: The two leading questions presented for our decision are:

First. Ought the case, under the circumstances thereof, to have been removed on the petitions, or either of them, for such removal to the United States Circuit Court?

Second. Was the sale made by the trustee, Joseph B. Stewart, valid; and did it operate to extinguish the Alexandria and Washington Railroad Company, and divest it of its corporate rights and privileges?

It would seem to me, without reference to the validity or invalidity of such sale, and without now passing upon the question

of its right to be regarded as a corporation, consistent with legal principles to regard, for the purposes of the decision of the points before us, the Washington, Alexandria, and Georgetown Railroad Company as a company capable of being sued, and of exercising certain powers. This company certainly insists on being so regarded; it has acted as such with a full board of officers and directors; and as such, has issued stock, bonds, and notes to a very large amount; it has been so recognized by the public; and transactions of great extent have taken place upon the faith of the existence of such company; and it was recognized as such by the act of Assembly of January 23, 1864, by which large powers and privileges were granted to it as "a lawfully existing company."

The question regarding the petitions for removal seems to me to require our first consideration.

[That part of the opinion of Judge WILLOUGHBY (and it is not mere courtesy to call it an able exposition of the law bearing on the question of jurisdiction) is omitted, as not bearing immediately upon the subject of Trusts. The profession will find in it evidence of a careful examination of what is becoming a very complicated question,—the relative jurisdiction of the State and National judiciary.]

The conclusion we have come to necessarily brings us to the consideration of the next question, the validity of the sale.

The deed of trust, upon which the sale was founded, contains this provision: "And it is mutually agreed, that in case of the death, incapacity, or resignation of the party of the second part, or of his successors in this trust, then the office of trustee filled by him shall become vacant, and such vacancy shall be filled by an appointment to be made by any court of record in the county of Alexandria, on the application of the parties of the first part, or of the holders of three-fifths of said bonds: Provided, however, in the last case, notice of the application of the parties making such request be given to the president or one of the directors of said company; and all the rights, power, and authority hereby conferred on the original trustee, shall then and there devolve upon and be invested in his successor or successors so appointed." It also provides that in case at any time six months' interest becomes due and unpaid, the trustee "shall, upon the request in writing of the holders of at least three-fifths interest of said bonds," cause the property to be sold at public

auction, after giving at least sixty days' notice of the sale by publication in certain newspapers therein named, and shall have authority thereupon to convey the said property to the purchaser.

This is a contract, the authority to make which is not disputed; and upon this depends the authority of proceedings in relation to the sale, but of course is to be construed with reference to the laws of the State then in force. The manner of serving this notice must then be supposed to be according to the law relating to such service. This notice is agreed to be the process upon which the jurisdiction of a court of record to appoint a trustee depends.

But we are met at the threshold of this inquiry into the validity of the order of the court, by the proposition, that as the court was one of general jurisdiction, its judgment can not be assailed only upon the ground of want of jurisdiction, and the presumption is, that all the steps necessary to give it jurisdiction were taken by the court. It should be borne in mind that this is not a proceeding in which this judgment is *collaterally* assailed, but is a bill in equity, filed for the specific purpose of setting aside this judgment and attacking it directly. The bill sets out facts for the very purpose of showing that the court did not have jurisdiction. Although the distinctions made in different cases as to when the record of a court may or may not be contradicted, are very subtle and somewhat difficult to reconcile, I do not think any case can be found in which it is held that such record may not be assailed in a *direct* proceeding for that purpose in equity, by showing fraud, or especially by showing that the court did not in fact have jurisdiction.

However this may be, I am sure that the defendant may be allowed to show that he had no notice, and that there was no process bringing him into court, by filing a bill in equity for this specific purpose, and by actually showing such want of jurisdiction. Any other construction of law would be the most apparent injustice, for there could be no other remedy. An appeal would not correct it, for on an appeal the party would be bound by the record as it is. A judgment of a court beyond its jurisdiction is plainly void; and to render a judgment *in personam*, it must have jurisdiction *of the person*. If it be

a judgment *in rem*, it must have jurisdiction of *the thing*.^{*} Every lawyer knows, for example, that a judgment in a case of attachment, if there is not also a service upon the person, is only a judgment against the *property*. Such a judgment does not authorize a levy of an execution upon other property, nor is it even evidence of a judgment against the person. This is not a proceeding *in rem*. In such cases courts acquire jurisdiction only by seizure of the thing, and even then, in most, if not all, cases, notice is given in some way to parties interested, by publication or otherwise, and especially if it is agreed that jurisdiction shall attach only by giving a notice. See *Penobscot Railroad Company v. Weeks*, 52 Maine, 456; *Hollingsworth v. Barbour*, 4 Pet. U. S. 466; *Harris v. Hardeman*, 14 How. U. S. 334; *Webster v. Reid*, 11 How. U. S. 437.

In *Harris v. Hardeman*, the court says: "In all judgments by default, whatever may affect their competency or regularity, every proceeding, indeed, from the writ and indorsements thereon down to the judgment itself, inclusive, is part of the record, and open to examination."

Applying this principle to the present case, on the examination of the affidavit of Joseph Davison, we find that the record itself shows that there was no notice. This would make it void *upon its face*. I can see no escape from this conclusion, and I do not see how it can be seriously questioned. In the case of *Vorhees v. The Bank of the United States*, 10 Pet. U. S. 449, the court say: "There is no principle of the law better settled than that every proceeding of a court of competent jurisdiction shall be *presumed* to have been rightly done *till the contrary appears*." This is a case strongly relied on by the *appellants*, and is perhaps one of the strongest cases on record upholding the validity of judgments of a court. But this was a case in *ejectment*, and a judgment of a court showing a sale by attachment was put in as defense; and in such a case the court say, though the record does not show the proper steps to have been taken, or even that the steps necessary to give jurisdiction were taken, it must be presumed that they were taken, and the facts could not be controverted in this collateral manner.

The cases of *Harvey v. Tyler*, 2 Wall. U. S. 328; *Florentine v. Barton*, 2 Wall. U. S. 210; and *Comstock v. Crawford*, 3

Wall. U. S. 304,—so strongly relied upon by the appellants, were all actions of ejectment, and the records were all sought to be set aside, by showing facts *aliunde*; and the court held that this could not be done. The case of *Devaughn v. Devaughn*, decided by us at the present term, was a decision upon an appeal from a judgment of the County Court, in which it was claimed that the record did not show affirmatively that it had jurisdiction; and we held only that it was to be presumed that the steps necessary to give jurisdiction were taken, and that the presumption must be that the court had evidence sufficient to justify the order which was made. But it is easy to see the difference between these cases and the one under consideration. Besides, in these cases the records did not disclose the want of jurisdiction on their face.

But it is urged by the appellants that they had a sufficient excuse for not giving a notice, from the fact that the persons entitled to such notice had all left the country, had gone beyond the Federal lines into the lines of a public enemy; that they had abandoned the property, and were traitors to the United States Government, and engaged in war upon that Government, and that it was impossible to give them notice; and the law does not require impossibilities. This presents a strong appeal to all those who were loyally disposed to the United States, especially when presented, as it is in the answer, in the fiercest language and in the most glowing terms. Still, we must not be misled by such an appeal, and must subject it to the test of legal principles. These facts were certainly not shown to the County Court. Nothing of them appears in the affidavits upon which the order was founded. If they could be regarded as an excuse for not bringing the person within the jurisdiction of the court, such excuse was certainly not made the basis of such jurisdiction, and it seems to me rather late to offer such excuse before another court to bolster up a jurisdiction which otherwise would fail. But suppose all this were true, and then shown to the court, it can not really be seriously contended that if the parties were the greatest criminals on earth, if they had left their property without any one to attend to it, that therefore they can be deprived of their rights or their property, except by the law of the land, or, in the language of the Constitution,

"by due process of law." Certainly this does not give to *individual citizens* the right to deprive them of such rights or property. Nor can I see how it matters whether such property were valuable or nearly worthless, or whether it had been properly or improperly managed.

But was it a sufficient excuse for not serving a notice, that the persons entitled to such notice could not be found? When a condition precedent becomes impossible of performance, a person may be excused from performing it; but it does not therefore always follow that *because* it is impossible, the right or privilege depending upon such condition precedent can be maintained, not even if this is made so by the acts of the other party entitled to such condition precedent.

Where a court has no jurisdiction of a person, it does not follow that *because* a party has done all that he could do to bring such person within such jurisdiction, and has failed, that *therefore* the court can proceed without obtaining jurisdiction. I can not say, however, that in this case this impossibility was caused by the act of the party entirely. He went South, it is true, voluntarily, but he went expecting to return soon; but he *could not* return. This was a misfortune for him; and it was also a misfortune, perhaps, for those whose rights were affected by his not being able to return. But it was a misfortune which resulted, for the most part, at least, from the war in which the Nation was unfortunately engaged, and by reason of which thousands of others, in common with the parties to this cause, unavoidably suffered, and for which courts and the usual legal proceedings could not afford an adequate remedy.

But it does not seem to me that the parties asking for the appointment of a trustee did, in fact, all that they might have done. The president of the old company still had a residence in Alexandria.

The deposition of E. S. Boynton, a witness for defendant, shows that he had a residence with his family until April, 1861, and he himself resided there until May, leaving his house and furniture in charge of said Boynton, and declaring that he expected to return in sixty or ninety days. We can readily infer, from the facts of history within judicial cognizance, why he could not have returned if he had wished. I can not discover,

from the records, how there is any proper evidence of his having engaged in arms against the Government, for the answer stating such fact could not have been given upon any knowledge by the affiant, and this is not to be presumed; nor is there any sufficient evidence showing that he did not, at all times, intend to return to his place of residence. In fact, the affidavit of Davison, upon which the order of the court was made, does not state that he had no residence in Alexandria, and is defective on that ground. This, at least, should be shown positively in any aspect of the case.

I can not see what excuse can be rendered for not serving the notice, by leaving a copy at his residence, as the statute prescribes. Besides all this, the deed of trust itself shows that Lenox, who was an officer and *director* of the company, and the trustee in the deed of trust, was a non-resident. Notice to him could certainly be given by publication, in accordance with the statute. Why could not this have been done? It was said that he received notice as *trustee*. But this would not *prevent* notice to him as *director*. What excuse can be offered for not notifying him by publication? This would have brought them within the provisions of the deed of trust.

If the facts, as alleged in the answer, were all true, and it appeared that the road and all the property were abandoned, and it was absolutely impossible to give any notice to any body, and in the mean time creditors had no other means of saving their rights, while such a state of facts might be urged with great force for a *court of equity* to assert jurisdiction for the protection of all parties interested, upon all these facts being brought before such court, I think it very clear that a *single* creditor, without regard to the rights of others, without showing the court this state of facts, can not, upon a single affidavit or petition, ask a court to make an order to protect his rights, and without really taking into its own hands the property itself for the benefit of all parties, owners as well as creditors.

Cases have been produced to us to show that a corporation, by abandonment and non-user of its franchises, forfeits those franchises. Suppose this to be so; I can not see how it would help these appellants. To whom would such franchise be forfeited? Evidently to the sovereignty from which they emanated.

This would not allow individuals to seize upon them. They could not take advantage of such forfeiture. The new company could not derive its existence from such a source.

It is objected that the application for the order was not made by a person authorized to do so by the *holders* of three-fifths of the bonds. I very much doubt whether the evidence fully establishes that any other than the person named, Benjamin Thornton, was the holder at the precise time.

It is very evident that Charles M. Wilkes was the *holder*, and entitled to *hold* within a very few days thereafter and some time before the sale, whether he was the owner or not, and entitled, as such holder, to determine whether he would allow them to be converted into cash or to remain on interest at seven per cent, or whether they should become extinguished in his hands by the conversion of the security into cash to go into the hands of a trustee not required to give security, and with whose appointment he has nothing to do, and whom he might not be able to compel to pay to him the money to which he was entitled.

Suppose, however, that we are wrong in coming to the conclusion that this order appointing the trustee should be set aside, the admitted facts of this case show very plainly, I think, that the sale should be set aside on the ground of facts occurring after such order. Suppose that Stewart were the proper trustee, invested with all the power of the original trustee, he has simply a naked power to sell. His authority is based only upon the deed of trust, and he must pursue the provisions of the deed strictly. He must be able to justify his act, not by any presumption or inference, but positively and necessarily. The divesting of the franchises and property of a railroad company is not to be permitted upon a doubtfully exercised power of a mere naked trustee.

The first step taken is, to say the least of it, a very doubtful one. Sale can be made only on the request, in writing, of the holders of at least three-fifths of the bonds. Now, the request in writing was, as specified by Davison, as agent and attorney in fact of the owners of more than three-fifths of the bonds. This is liable to two objections: first, there was no *writing* then produced from even the owners of the bonds. There was a writing from Davison, but this was not founded upon a writing

from the owner. There is not, to this day, written evidence that the owner then, at that time, had ever authorized this demand; second, even if Davison was the agent of the *owners*, this does not necessarily imply that he was the agent of the *holder*. An owner may, and often does, divest himself for a time of the possession and right to hold his property; and for all that appears in this written notice, this may have been done. More than this: the reasonable probability from the evidence is, that this was actually done at the time of giving this notice. While this fact may not appear to be sufficiently established to set aside an order of court, it does appear sufficiently to throw great doubt upon the power of the trustee to proceed to the sale. Certainly, at the time of the sale, Thornton was not in a position to deliver up the bonds, or to require the delivery. But let us look further at the subsequent conduct of this trustee, and the circumstances of the sale.

A trustee is the agent of both parties. He is especially of the party constituting him such trustee. His duty is to be perfectly fair in all his conduct, and especially to see that the interests of the party who has conferred upon him this power are protected to the fullest extent. His action has, therefore, been held to be especially the subject of inquiry by a court of equity, *Gibson's Heirs v. Jones*, 5 Leigh, 370; and as such it is his duty to do all that can reasonably be done to effect the most advantageous sale possible. It has, therefore, been the common practice of our courts to require that in all such sales, if there are prior liens, either contested or doubtful, or not precisely ascertained, such liens shall be ascertained, so that they may be made known to the purchaser, *Cole's Administrator v. M'Rae*, 6 Rand. 644; *Rossett v. Fisher and others*, 11 Gratt. 492; 15 Gratt. 83 and 103. Otherwise, how is it possible that there could be any thing like a fair sale of the property? Now, what were the facts in this case? The affairs of the road were confessedly, and in fact charged to be by the defendants themselves, in a most complicated condition. There were numerous judgments, and two deeds of trust. Most of the judgments, it is true, were in fact subsequent to the deed of trust. But the fact should have been well ascertained as to which were prior and which were subsequent. There were a large number of liabilities

of the company, and as the defendants themselves allege, persons owning these liabilities were making them known even at the sale. The question of the validity of the two prior deeds of trust was openly made at the sale. The trustee of the deed of trust for \$60,000 was present at the sale, asserting its validity, while Stewart says, in his deposition, "I at the same time saw fit openly to dispute the validity of both the deeds of trust of the corporation of Washington, and Fowle, Snowden & Co., as valid liens upon the road;" and the record shows that there is at this time a contest in the courts concerning the validity of this first deed of trust.

Now, under such circumstances, was it possible that there could be any thing like a reasonable sale? How could a purchaser have any knowledge of what he was buying? The Code provides, ch. 61, sec. 29, that when a purchase is made of the works and property of a corporation, the purchaser shall not be entitled to the debts due to the first company, nor be liable for any debts of or claims against the company, "which may not be expressly assumed in the contract of purchase."

The defendants contend that by this sale a new company was formed. If this be so, ought not the contract of purchase show whether the debts and liabilities of the old company were assumed? Ought there not to have been at the sale an understanding whether it was sold subject to the debts and liabilities of the old company or not? If not, then the purchaser should know it, for it would make a material difference in his bid. Certainly this ought not to be left to the mere will of the purchaser, after he has made his bid. The matter ought to have been clearly and plainly understood at the sale, and I think it would have been proper, if not necessary, that the advertisement of the sale should have stated how the sale would be made. It should, at least, have been made known *generally*, as well as to the *purchaser*, Hay, whether the sale was subject to the debts and liabilities of the old company or not.

Again, the record discloses that Stewart, who all the time professed to act in the capacity of attorney for the purchaser, Hay, had already in his hands more than sufficient money, the property of the company, to pay all that was then due upon the bonds. This fact Hay must be presumed to have known, and to

have purchased with this knowledge. That the interest of the seller was not properly attended to, is further seen by the fact that the United States Government had possession of the road during all this time, and it was a well-known fact that possession could not then be delivered; and no one could tell when it would be, or what claims the Government would have upon it when so delivered. It was impossible that, under such circumstances, a sale could be made otherwise than at a ruinous sacrifice. The position of Stewart was, to say the least of it, a peculiar one. He was, if properly appointed, the trustee to make the sale, and as such, in duty bound to effect the *best* possible sale; and the attorney, at law and in fact, of Hay, the purchaser, and as such interested to procure the sale on the *lowest* possible terms. More than this, he had made an agreement in writing with Davison, in which he stipulates what he will do, "on behalf of himself and constituents," in case the road be purchased by *himself* or constituents; showing that he was then contemplating a purchase by himself, as well as by his principal and client. Can he be said to have been perfectly impartial and disinterested? Is it possible that a trustee for sale can at the same time be attorney at law and in fact for the purchaser, and acting in his interests? Stewart, in fact, did immediately become interested in the purchase. He had also previously been appointed, by writing, the attorney for Davison, the agent of the bondholders, and as such was to receive from him a large contingent fee in case of a sale of the road; he to use all diligence in the closing out and perfecting the interest of said bondholders in and to said road. (What interest had the bondholders in the road, except to receive the money which might be realized from the sale?)

On this writing there was indorsed by Joseph Thornton, May 3, 1862, "There will go to Mr. Stewart \$35,000 of stock out of the \$142,000 set over to me, his \$35,000 being subject to a *pro rata* deduction in making up the \$50,000, or whatever may be used of that amount, which is set apart." This \$50,000, it otherwise appears, was to be set apart for procuring a charter from Congress. It is true that Stewart testifies that no agreement was effected with Davison and Thornton *before the sale*. But these papers appear to have been executed; and he himself testifies that the probabilities and feasibilities of forming a new

company were much discussed, and, as he says, "in the event that either Thornton or Davison became the purchaser, the question of who would take an interest, and how, was much figured over as a thing entirely prospective, and it was agreed, if I saw fit to do so, *I could be one of the parties forming the new company.*" These facts show, I think, that Stewart was at least so far interested in the purchase as to render it impossible for him to act as trustee with that propriety which a court of equity requires.

It further appears, that no money was ever paid to the holder of the bonds from the proceeds of the sale, but they were still, by the permission of said trustee, and at the request of Joseph Thornton, allowed to remain in the bank of Riggs & Co., at Washington, as the basis of a loan to Benjamin Thornton from one Wilkes, of something over two thousand pounds, and a portion of the proceeds were used in reorganizing the new company. A company was immediately organized, of which Stewart was the secretary and a large stockholder, and stock was issued to the amount of \$300,000. This fact tends strongly to show that the object of the sale was not so much to satisfy the amount due upon the bonds, and in accordance with the real wish of the holder of the bonds, as it was to get the title of the old company into the hands of these parties, who were devising a plan by means of which they could form a new company, and which had been much "*figured over*" by all these parties, including the trustee.

By special act of Assembly, this new company was soon after authorized to issue stock to the amount of \$500,000, besides bonds to the amount of \$200,000, and notes to the amount of \$100,000.

Stock has been issued to a large amount in excess of the amount authorized, as the decree states, and bonds, etc., have also been issued, and out of this money has been raised and in part expended for the benefit of the road; so that it will be seen that other parties have equities in the road, which should be provided for. This history of the transactions connected with the sale must show, I think, that even if the order appointing Stewart was perfectly valid, yet the sale was conducted in such a manner, and shows such a state of

actual fraud, that it can not be sustained by a court of equity.

It is urged upon us with great earnestness and force, that even if such order were void, and the sale was an illegal and fraudulent one, yet that the company, taking no steps for a period of four years, and allowing the stockholders of the new company to invest large sums of money on the faith of the validity of such sale, without being cognizant of such fraud, the old company should be considered as having acquiesced in such sale, and should now be estopped from contesting such validity as against them. There are cases which show that acquiescence in sales made by order of a court of competent jurisdiction for a long period, shall be regarded as a waiver of the right to contest the validity of such sales. In extreme cases, where there has been long acquiescence, sales made *by the order of the court* have been sustained, on the ground that judicial sales ought to receive the highest possible sanction, and should be regarded as giving the utmost possible protection to the purchaser.

But, in the first place, the acquiescence which is shown in this case is not of such a character as I think should be regarded as an estoppel.

The parties who alone could object for the old company were in such a situation that, so far as they were concerned, it was for nearly the whole period a *forced* acquiescence. True, they had gone into the lines of public enemies against the United States, and had gone voluntarily; but whatever may be said of the wrongful nature of said acts, yet they were in such a situation that it can not be said that, during this period, they *voluntarily acquiesced* in the disposition of their property. Besides, up to August, 1865, the Government was in actual and exclusive possession and control of all this property; and while it was so, I do not think any party could be justified in claiming to act in entire ignorance of all claims that might be brought against it. I can not give any countenance to the claim that the Government held, as a tenant of Hay under a contract made by him, as a mere creditor, and with no claim upon the road, except such as might have been satisfied by the payment of \$5,000.

Again, so far as the sale was concerned, it was not a *judicial one*. The court had nothing to do whatever with the *sale*. The

court simply substituted one trustee in the place of another. The court did not direct the *sale*. The sale was not professed to have been made by any other authority than that of a trustee, with no power to guarantee the title, who did not profess to guarantee the title, and the purchaser was bound to make inquiry and to fully investigate the sources of his authority, and if he neglected to do so, it was his own negligence. And such a sale is not at all like one where a purchaser has an order of a court of competent jurisdiction, and which he is authorized to presume to be correct.

Again, a corporation can not be created by mere acquiescence. This can be done only by positive act of legislation, or by some power authorized by some legislative act. Still, under the circumstances of this case, the new company ought to have reimbursed to it the money which it has actually expended for the benefit of the road, which ought to go to its stockholders.

A very large portion of the money invested by the stockholders seems to have been upon representations for which the old company could be in no wise responsible, and it certainly could not be regarded as having acquiesced in them. Much of it has been upon false and spurious certificates of stock, issued by the new company; but the remedy of those who have thus been deceived is upon those whom they have trusted. Their case is an extremely hard one, and appeals strongly to our sympathies, and so far as they can be lawfully protected, they should be.

They claim that a very large amount (several hundred thousand dollars) has been expended for the benefit of the road, and provision should be made for the repayment of so much of this as they can establish; and this can be done under the decree as it now stands, and such further orders as may be made by the court upon a consideration of the evidence which may be produced.

The new company procured a special act to be passed by the Alexandria Legislature, February 5, 1863, declaring this sale to be a valid one. This act was in plain violation of the Constitution, and therefore void. It was an assumption of judicial power by the Legislature.

Art. ii, Constitution of Virginia, declared "the legislative,

executive, and judicial departments shall be separate and distinct, so that neither shall execute the powers properly belonging to either of the others.

Art. iv, section 35, provides that the General Assembly shall not, by special legislation, grant relief in a case of which the courts or other tribunals may have jurisdiction.

Besides, it attempts to divest antecedently vested rights, and also to impair the obligation of the contracts between the parties. See *Taylor v. Stearns, et al*, 18 Gratt. 244, 274.

I can see no necessity for giving a construction to the statute relating to the sale of the works and property of a corporation, and the powers and privileges of the purchaser at such sale, sections 28 and 29, ch. 61, of Code of 1860. This is a matter rather for the new company and those connected therewith to settle among themselves, and suits are now pending, as I am informed, to determine the questions between them.

The decree of the court below very properly provides for an investigation into the equitable interests of the several parties to this controversy, and for security for their protection, and I see no reason why it should not be fully affirmed. DECREE AFFIRMED.

BURNHAM, J., dissented.

JAMES, *et al*, v. RAILROAD COMPANY.

[Decided at the December term, 1867, of the Supreme Court of the United States, Justice SAMUEL NELSON delivering the opinion. Reported in 6 Wallace, 752.]

Where, under the laws of Wisconsin, a mortgage by the La Crosse and Milwaukee Railroad Company upon its railroad and appurtenances had been foreclosed, a sale made and confirmed, and a new company under the name of the Milwaukee and Minnesota Railroad Company had been organized by the purchasers, being the directors who made the mortgage and others holding the bonds secured thereby, this Court, upon a creditor's bill filed by judgment creditors of the mortgagor, *held*, on the facts of the case, that the sale was fraudulent, and that it should be set aside, and the new company perpetually enjoined from setting up any right or title under it; the mortgage to remain as security for the bonds in the hands of *bona fide* holders for value, and that the judgment creditors (the present complainants) be at

liberty to enforce their judgments against the defendants therein, subject to all prior incumbrances.

Where the notice of the sale of a railroad under mortgage to secure railroad bonds, set forth that the sum due under the mortgage for the principal of bonds was \$2,000,000, with \$70,000 interest, when, in fact, less than \$200,000 was outstanding in the hands of *bona fide* holders for value, the remainder of the \$2,000,000 being either in the hands of the directors or under their control, such a notice was fraudulent, and of itself sufficient to vitiate the sale.

APPEAL from the Circuit Court for Wisconsin; *James, Brewer, Greenleaf, Justice*, and others, being the appellants, and the *Milwaukee and Minnesota Railroad*, appellee.

Messrs. *Cary and Carlisle*, for the appellants. Messrs. *Cushing and Stark*, for the appellee.

Mr. Justice NELSON stated the case, and delivered the opinion of the Court:

The bill before us is a creditor's bill, filed by four different judgment creditors, against the defendants, to set aside, as fraudulent and void against creditors, the sale under a mortgage made to Barnes, 21st of June, 1858, for two millions of dollars, by the La Crosse and Milwaukee Railroad Company, which sale took place on the 21st of May, 1859, and under which the defendants' company was organized; and that the company be perpetually enjoined and restrained from exercising any control over the property or franchises mentioned in said mortgage, or from interfering in any manner with the road or its franchises; and, further, that the said company be decreed to take nothing under the sale, and that the property and franchises of the La Crosse and Milwaukee Company may be sold and applied, after discharging all prior liens, to the satisfaction of the judgments of the complainants.

The complainants consist of the firm of F. P. James & Co., who are the owners of a judgment against the La Crosse and Milwaukee Company for \$26,353.51, recovered in the District Court of the United States for the District of Wisconsin, on the 5th of October, 1858, in favor of Edwin C. Litchfield, and which came to the complainants by assignment.

Nathaniel S. Bouton, who recovered in the same court a judgment against the same company for \$7,937.37, on the 5th

of April, 1859, and which judgment came to the firm of F. P. James & Co., by assignment; Philip S. Justice and others, who recovered a judgment in the Circuit Court of Milwaukee County against the same company for \$235.33; and E. Bradford Greenleaf, a judgment in the same court against the same company for \$840.06. These judgments were liens on the La Crosse and Milwaukee Railroad, subsequent to the mortgage to Barnes, already referred to, which, with the sale under it, is sought to be set aside as fraudulent and void against creditors.

The mortgage was given to secure the payment of an issue of bonds for two millions of dollars, on the 21st of June, 1858, and which were issued accordingly by the president and secretary, and were made payable in thirty years, one thousand bonds of one thousand dollars each, fourteen hundred of five hundred dollars each, and three thousand of one hundred dollars each, interest at seven per cent, payable semi-annually on the first day of January and July in each year, with coupons attached. The sale under the mortgage took place on default of the payment of the first installment of interest, six months after it was executed. Barnes, the mortgagee, acted as auctioneer, and bid off the property himself, as trustee for the bondholders, who soon after organized the Milwaukee and Minnesota Railroad Company, one of the defendants in this suit.

As appears from the proofs at the time of this sale, there had not been two hundred thousand dollars advanced on the entire issue of the two millions of bonds; indeed, the actual amount is but little over one hundred and fifty thousand dollars. Five hundred and fifty thousand dollars of the bonds do not appear to have been negotiated at all, which were held in trust and never used, and one hundred and three thousand had been returned and canceled, making in the aggregate six hundred and fifty-three thousand. Four hundred thousand were given to Chamberlain to secure a note of the company for \$20,000, which he sold at auction, and which were bid in, principally, by the directors, at five cents on the dollar. Three hundred and ten thousand dollars of the bonds were given to secure a loan of \$15,000, and which came into the hands of the same persons, or their friends, for about five cents on the dollar.

It is charged in the bill, and the proofs are very strong in

support of it, that this note to Chamberlain for \$20,000, and the loan of \$15,500, to secure the payment of which these bonds were given—\$400,000 in amount for the first sum, and \$310,000 for the second—were made by the company for the purpose, and with the intention, of obtaining a division of them, among the directors, at merely nominal prices. It is very fully established that this was, in point of fact, the result of the two transactions.

We have looked with some care into the proofs, and into the brief of the learned counsel for the defendants, to ascertain the portion or amount of these bonds, or of the stock of the Milwaukee and Minnesota Company, into which some of them were converted, that are now in the hands of *bona fide* holders, and we find no evidence in the record tending to show any amount beyond the sum already mentioned, less than \$200,000. These were the only outstanding bonds existing at the time of the foreclosure and sale for which value had been paid; the remainder of the two millions of dollars were either in the hands of the directors or under their control, and not negotiated, or, they were in their hands under the fraudulent arrangements we have already stated, at nominal prices. Nor do we find that the present holders of the bonds or stock of the company are in any better or more favorable condition than those who organized the defendants.

The notice of sale set forth that the mortgage debt was two millions of dollars, and that seventy thousand dollars of interest were due.

It needs no authorities to show that such a sale can not be upheld without sanctioning the grossest fraud and injustice to the La Crosse and Milwaukee Company, the mortgagee, and its creditors. This deceptive notice was calculated to destroy all competition among the bidders, and, indeed, to exclude from the purchase every one, except those engaged in the perpetration of the fraud. The sale, therefore, must be set aside, and the Milwaukee and Minnesota Company be perpetually enjoined from setting up any right or title under it—the mortgage to remain as security for the bonds in the hands of *bona fide* holders for value; and that the judgment creditors, the complainants, be at liberty to enforce their judgments against

the defendants therein, subject to all prior liens or incumbrances.

Mr. Justice MILLER dissented.

JOHN B. ROSTETTER AND WIFE v. WILLIAM C. GRANT.

[Decided at the December term, 1868, of the Supreme Court of Ohio, Justice JOHN WELCH delivering the opinion. Reported in 18 Ohio St. 126.]

Where a husband, holding title to land in trust for his wife, at her request bargains and sells the same to a stranger, a specific execution of the contract will be decreed against the husband, at the suit of the purchaser, although the wife joins the husband in resisting the same.

As the right of the wife in such case is a mere equity, and she can have no claim of dower in the property, it is unnecessary for her to join her husband in the deed of conveyance, in order to vest in the purchaser a title freed from her claim; and it is not error in the court to order the husband to convey such title.

ERROR TO THE DISTRICT COURT OF STARK COUNTY.

THE action in which the judgment sought to be reversed was rendered, came into the District Court by appeal. The facts of the case are specially found by the Court, and are as follows: In 1863, the plaintiff, John B. Rostetter, in whom was vested the naked legal title of land which in equity belonged to his wife, at her request bargained and sold the same to the defendant, William C. Grant, who was ignorant of the wife's right therein. Part of the purchase-money was paid in hand, and by the written contract of sale Rostetter bound himself to make a conveyance, by good and sufficient warrantee deed, upon payment of the remainder of the purchase-money, at a specified time. At the end of the period fixed, Grant tendered the remainder of the purchase-money and demanded a deed. Rostetter declined to make the deed, on the alleged ground that his wife refused her assent thereto, or to join in its execution; the fact being, however, that she was willing, and offered to join in the deed, on the condition that the purchase-money should be paid or secured to her, instead of her husband; and she refused

to sign the deed solely because the husband desired her so to refuse, and would not consent to her receiving or having the money. Grant thereupon filed his petition in the Common Pleas against Rostetter, asking for a specific execution of the contract. The wife, also, was made a party defendant, after the cause came into the District Court, and she there filed an answer, in which she alleges that she is unwilling to join in the deed of conveyance; and prays that her husband may be adjudged and decreed to convey the land to trustees for her use.

Upon this state of facts, the District Court adjudged and ordered, that the contract of sale should be specifically executed, by Grant's paying the remainder of the purchase-money into court, for the use of the wife, and by Rostetter's conveying the land to Grant by good and sufficient warrantee deed, "free and clear from all claims of his wife."

The errors alleged are, in substance, that the court rendered a decree for specific execution, whereas it should have ordered the land to be conveyed to the wife. Since the filing of the petition in error the wife has died, and her legal representatives have been made parties.

John M'Sweeney, Bierces Pease, and Meyers Manderson, for plaintiffs in error. *J. A. Ambler*, for defendant in error.

WELCH, J.: We see no error in this decree, to the injury of either of the plaintiffs in error. The husband complains of it, for the alleged reason that it requires him to coerce his wife into the execution of a deed. The answer to this complaint is, that the wife need not sign the deed. The full legal title is in the husband, and his deed alone will pass that title to the purchaser. The wife can have no claim for dower, either in her own land, or in land held by her husband as mere trustee. She has either a right to the whole estate, or to no part of it; and if she has a right to the whole, it is a mere equitable right—a right to go into equity and compel a conveyance of the legal title. This is precisely what she is attempting to do in the present case. She has no title which she can *retain*, by refusing to join in a conveyance. If any thing, she has a mere right to *acquire* the title. The husband, therefore, has no just

ground to complain of this decree. It only requires him to fulfill his plain and admitted agreement, by executing his own deed.

Has the wife any just ground to complain of the decree? She says that Grant; not having completed the purchase, can not claim the right of an innocent purchaser without notice; and that no *estoppel* can be pleaded against her, as she is a married woman; and she, *therefore*, claims that the court erred in refusing to order the title of the land vested in a trustee for her use. But the title has already been vested in a trustee for her use. Why change the trustee? Surely, another can not be found more watchful of her interests, or more willing to subserve them, even to the violation of his own contracts and rights, than her husband has been. There seems to be a perfect accord between the husband and wife in this matter. When she requests him to sell, he sells; and when she requests him to disregard the contract of sale, he disregards it. No danger of her interests suffering in his hands. As often as he sells at a low price, he will get her to object, and then rescind the contract, until he shall finally make a satisfactory sale, perhaps for more than it is worth, and then he will, at her request, ask for a specific execution. If the court had placed the property in the hands of another trustee for her use, as she requested, surely one of the duties of that trustee would be to sell the property according to her directions. That is just what the husband did. If her counsel are right now, in contending that no sale or conveyance is valid unless she joins in the deed, the new trustee would be as powerless to sell the land as the old one; and she might as well have the title vested in her own name at once. Any attempt by the new trustee to sell her land—especially if the land should happen to raise in value after making the contract of sale—might only result in another suit like the present. We hold the law to be, that as soon as her trustee, the husband, bargained and sold the land *at her request* to Grant, her equity was changed from the land to the purchase-money. In equity, the land became the property of Grant, and the purchase-money became hers. There is, therefore, in the case no question of “purchase without notice,” or of “*estoppel*,” or of the power of a court of chancery to decree against the husband a conveyance

of the estate of the wife. Rostetter was a *trustee*, and the contract of sale, made by him at the request of his wife, the *cestui que trust*, was made in the legitimate exercise of his powers as such trustee, and should be specifically executed, notwithstanding the objection of the wife. JUDGMENT AFFIRMED (a).

DAY, C. J., and BRINKERHOFF, SCOTT, and WITE, Justices, concurred.

(a) An agreement by the trustee of a married woman, that the trust estate shall be charged with her debts, will not be sufficient to bind the estate. Her contract is indispensable for this purpose. Only the profits of a trust estate held for a married woman, will be subjected to the payment of her debts, *Burch v. Breckenridge*, 16 Ben. Monroe, 488.

A trustee of the separate estate of a married woman can maintain a suit in his own name alone, to recover possession of the trust property from one who has seized it in execution against the husband of his *cestui que trust*, *M'Clannahan v. Beasley*, 17 Ben. Monroe, 117.

Duwall v. Graves, 7 Bush, 461: For the purpose of securing to the wife, who was then an infant, the exclusive right to all her estate inherited from her deceased father, she and her contemplated husband, in 1838, conveyed all her property to her mother, in trust, with power to sell with *her* concurrence. In 1845, the trustee, with the concurrence of the wife, sold part of the trust property—the deed being signed by the wife and the trustee. After more than twenty years, the husband and wife brought suit for the recovery of the property, on the ground that in consequence of her infancy the power of sale was void and not confirmable; and if only voidable, and therefore confirmable, the deed of 1845 did not confirm the sale, because, though not then an infant, she was still covert, and her husband did not join in the deed. *Held*, that the husband's concurrence was not necessary to a confirmation of the conveyance of 1845. Within the scope and prescribed limitations of the deed of trust, the sole beneficial owner of the estate was the wife, and as such could consent to the sale, by her trustee, as effectually without as well as with her husband's concurrence. That the husband was estopped by his deed of trust, and had no interest in the execution of the trust; and the trust deed being voidable only by the wife, after the great lapse of time, and the equities in the case, she could not disaffirm her acts by a suit jointly with her husband for the recovery of the land sold in 1845.

FARIS AND WIFE v. DUNN, *et al.*

[Decided at the Summer term, 1870, of the Court of Appeals of Kentucky, Chief Justice GEORGE ROBERTSON delivering the opinion of the Court. Reported in 7 Bush, 276.]

APPEAL FROM GARRARD CIRCUIT COURT.

A married woman relinquished her dower in five hundred acres of land sold and conveyed by her husband to their son-in-law, on the condition that their single daughter should have one hundred acres of the land, or its equivalent, ten thousand dollars, to secure her a home.

True to the trust, the father bought for his daughter a hundred acres of land selected by her, and paid for it with her money, received and held for that purpose, and without her knowledge or consent took the conveyance of the legal title to himself. Immediately after the purchase in 1852, the father put his daughter in possession of the land so bought for her, where ever since she has resided as her only home. *A trust was thus raised in favor of the daughter in possession*, which was sufficient to protect her possession and title against the mortgagees of her father.

Resulting trusts may be established by oral testimony as satisfactorily as by written evidence, *Boyd v. M'Clean*, 1 Johnson's Ch. 583.

A party having a prior subsisting equity—an available resulting trust—combined with long possession, under a verbal contract not void, would have a sufficient defense, even if not enforceable as a trust against parties in the adverse possession.

A good defense to a party in possession of land, might not be enforceable as a good cause of action against another party in the adverse possession of the same land.

Before a devisee can be required to make an election, the will must clearly show that the testator so intended. Every case of election therefore supposes a plurality of gifts or rights, with an intention, express or implied, of the party who has the right to control one or both, that one should be substituted for the other.

Not being pleaded, the question of estoppel was not litigated in this case.

Purchaser of one's own land at a decretal sale—purchaser is released from bonds for purchase price in this case. See opinion and response of the Court for the facts and reasons for this decision; and the surety is still required to litigate his liability on the bonds for the purchase of the land, as if substituted to the place of the principal, while the principal is fully released. See the opinion and response of the Court for the facts and reasons for this decision.

George R. M'Kee and *R. M. & W. O. Bradley*, for appellants. *Geo. W. Dunlap*, for mortgagees, *Dunn, et al.* *John S. Van Winkle*, for *W. A. Hoskins*.

CHIEF JUSTICE ROBERTSON delivered the opinion of the Court: This has been a prolonged and vexatious litigation, and this Court has hitherto reversed three successive orders of the Circuit Court, and remanded the case, each time for further preparation; but in no instance concluding or affecting the appellant, Mrs. Faris, in her title to her home, which is the ultimate question involved. And now, though we think that the Circuit Court again erred in rejecting the cross-petition of the appellants against William A. Hoskins, yet, considering the case sufficiently prepared for a final decision, so far as the appellants are concerned, in the fundamental question, which can not be affected by collateral controversies, we will at once proceed to consider that vital question, and to that extent close this case.

Before the year 1852, William Hoskins—upright, industrious, economical, and provident—owned his homestead tract of about five hundred acres of first-rate land in Garrard County, at the forks of the turnpike from Lexington to Danville and to Lancaster, equi-distant from the bifurcation; and also seven valuable slaves, three of whom were excellent blacksmiths, and a corresponding personalty. Becoming too old for such cares, and being to some extent embarrassed by advancements to most of his children and responsibilities for some of them, he sold his land to his son-in-law, “Dick Robinson,” who sold to John S. Hoskins, who sold to Richard Robinson, and who sold to William A. Hoskins, who resold to the said Robinson, the son-in-law of said William Hoskins, to whom the legal title was conveyed, on the condition that original vendor’s daughter, Eliza V. Hoskins, now Faris, who had devotedly dedicated a long celibacy to the care of her aged parents, and had never been advanced, should have one hundred acres of the land, or its equivalent, ten thousand dollars, to secure her a home whenever needful. Her mother refused to relinquish her dower unless that provision should be made, and finally made the relinquishment in consideration of that plighted lien for her faithful and otherwise unprovided-for daughter. She preferring another hundred acres in sight of the old homestead, and Robinson being pleased with her choice, her father, true to the trust, bought for her the selected tract; paid for it with her money, received and held *for that purpose*; and, as we may presume from the record, without

her knowledge he took a conveyance of the legal title to himself, which, when informed of the fact, she urged him to convey to her; but he deferred it to his will, and assured her that her title should in that way be secured. Immediately after that purchase in the year 1852, her father put her in possession of the land so bought for her, where ever since she has resided as her only home, and so always recognized by her parents, her brothers and sisters and neighbors, and for a long time by her brother-in-law, "Dick Robinson" himself, for whom "Camp Dick Robinson" was so named. Her father died in December, 1862, and in 1866, during the pendency of this suit, her mother, who lived with her, being also dead, she intermarried with her coappellant, James W. Faris.

On the 12th of February, 1859, her father, having become indebted to several persons about eight thousand dollars, on his son William's account, as we feel authorized to believe, mortgaged his slaves and her "home" to indemnify the mortgagees, Dunn and Richardson, and the said Dick Robinson, for their undertaking to pay within a year that aggregate debt. She did not consent to the mortgage of her land, and her father resisted it until overcome, as one of them admitted, by the *persuasion* of the mortgagees; and doubtless he finally yielded under the belief that his son William would redeem the mortgage, and that if he should fail to do so, the other mortgaged property would save her land—as it might and probably would have done had the slaves been opportunely sold by the mortgagees.

In August, 1863, the mortgagees filed a petition to foreclose their mortgage, which the appellant, Eliza, resisted as to her land on various defensive grounds. The Circuit Court, however, decreed the sale of that land alone. At the sale by the commissioner under that decree, to prevent the embarrassment and difficulty that might result from a purchase by a stranger, she, advised, as we infer, by her brother William (who promised to become her surety, and who, as appears to us, said he would pay the debt), bought the land for the amount required to satisfy the mortgage, and executed bonds with the said William as her surety.

To compel him to relieve her from these bonds, not yet collected, was the principal object of her cross-petition against

him; and that litigation in some form may survive our judgment in this case, even though her petition was dismissed by the decree appealed from, and by which she was also ordered to pay off the sale-bonds or give up her home.

Upon the facts proved, this Court is satisfied that, waiving questions of champerty and limitation on account of long and adverse possession, the appellant, Eliza, for not only a good but a valuable consideration, is entitled to the land in contest, under a valid and available resulting trust. Such right would be clear at common law; and as she does not appear to have consented to the conveyance of the legal title to her father, and he moreover disregarded the trust by that nominal conveyance, the 20th section of the chapter on real estate, 2 Stanton, 130, does not affect her equitable right, as recognized and protected by the modern common law against purchasers with notice of it; but the 22d section of the same chapter excepts and saves it (a).

And in this case Robinson, as one of the mortgagees, being also a party to the trust, had indisputable and conclusive notice of all the facts from which the trust resulted, and, though not necessary, the other mortgagees had presumptive notice. They all took the mortgage, therefore, subject to her prior and still subsisting equity, which, *combined with her long possession under a verbal contract not void, would be sufficiently defensive against them, even if not enforceable as a trust had they been in the adverse possession, and she, as plaintiff, had sued them.* She is not estopped by bidding for the land and executing the bonds for the price. She bid for only what was beneficially her own, and thereby did the mortgagees, who knew that they had no right to sell her land, no harm. Her bonds, therefore, were executed without any binding consideration, and are held as an implied trust of revocation by her volition.

(a) The provisions of the Revised Statutes of Kentucky having a bearing on this subject of resulting trusts, are as follows: Sec. 20. Where a deed shall be made to one person, and the consideration therefor shall be paid by another, no use or trust shall result in favor of the latter. Sec. 21. Such deeds shall be deemed fraudulent, as against the existing debts and liabilities of the person paying the consideration. Sec. 22. The provisions of the section before the one next preceding this, shall not extend to cases where the grantee shall have taken a deed in his own name without the consent of the person paying the consideration, or where the grantee, in violation of some trust, shall have purchased the lands deeded with the effects of another person.

There is no estoppel here, nor in her conduct as nominal executrix associated with the mortgagee, Dunn, as acting executor; nor in any of her personal conduct, active or passive, properly considered, do we see any thing that should estop a helpless and confiding woman, always ignorant of her rights and of the law, and most of the time covert, from continuing to assert her meritorious and enforceable claim to the land; and insisting on her exoneration from the burden of again paying for it, and releasing her from the bonds, and thereby devolving the whole obligation on her co-obligor, W. A. Hoskins (who is equitably prosecuted), will do no injustice to him or to the mortgagees. The mortgagees recklessly included her land in the mortgage against the mortgagor's free will, and without her consent or knowledge, when they knew, or ought to have known, that it was equitably hers, and in her actual possession, unassailed and in conscience unassailable. And moreover, had they sold all the slaves as soon as they might have done so, but little, if any, of the mortgage debt would have been left unpaid. Only by keeping two of the blacksmiths—proved to have been worth fifteen hundred dollars each as late as the year 1863—they lost three thousand dollars as a consequence of the emancipation of those slaves in 1865. And though in a former opinion this Court suggested that it was not *then* "*prepared*" to say that the mortgagees should account for any of the slaves, yet subsequent developments and the present status of the parties have essentially changed the phase of the case on that point. If the mortgagees lose any thing, it is their own fault.

Nor can W. A. Hoskins justly complain if the burden of the bonds shall fall on him, and thereby this litigation shall, by subrogation and transference, be carried on by and between him and the mortgagees and executors, as the parties whose conduct originated and prolonged this vexatious and unnecessary strife. This record affords intrinsic evidence that he, without any apparent capital of his own, drew on his father's generosity for supplies for speculating adventures, and thereby contributed largely to his father's embarrassing change of condition, otherwise inexplicable. His letters to his father and to his sister Eliza conduce to show that he owed his father more than the debt for which the mortgage was given, and prove that he

therefore promised his father that he would relieve him, and promised her that if she would give up her home he would buy for her a better; and these and other facts indicate that the mortgage debt was incurred for his benefit by his father, and that the mortgage would never have been given if he had complied with repeated promises to extricate his father from embarrassment.

Without reference to other circumstances, we are satisfied, *upon the record now before us*, that he owed his father as much at least as the amount due on the mortgage, and therefore, as between the appellant Eliza and himself, he should not complain if the whole burden of the sale-bonds be put on him. But as his indebtedness to his father's estate has not been litigated between him and the mortgagees, or between him and Dunn, as executor, and especially as the contemplated litigation between them as antagonist parties may evolve other material facts, what we have said is not to conclude him on that question, or fetter a full investigation between him and them as opposing parties. He will be entitled to all credits to which the mortgagor, if living, would be entitled, in a contest between him and the mortgagees, whether on account of any of the slaves, or payments of any portion of the mortgage debt, or otherwise. And these will be the principal questions in the transposed litigation between parties not hitherto conflicting.

From the foregoing considerations, we conclude that the appellant, Eliza, should be released from the sale-bonds, and is entitled to conveyance of the one-hundred-acre tract of land to her separate use in fee-simple, unincumbered by the unpaid consideration, and that the payment of the bonds should be settled by an ulterior litigation on amended pleadings between the mortgagees and executor on one side, and Wm. A. Hoskins on the other.

Wherefore the judgment against the appellant, Eliza, subjecting her to the payment of the sale-bonds and dismissing her cross-petition, is reversed, and the cause remanded, with instructions to dismiss the petition of the mortgagees so far as it affects her, and to cause a conveyance, as just indicated, to be made to her as purchaser at the sale by the commissioner, and also to allow the executors and mortgagees and Wm. A. Hoskins

to amend their pleadings, so as to litigate between themselves concerning the payment of the bond for which said William is now alone responsible as co-obliger.

Judge PETERS dissented from the foregoing opinion.

To appellee's petition for rehearing, Chief Justice ROBERTSON delivered the following RESPONSE:

As the opinion in this case has been in several respects misconceived, and consequently misrepresented, we consider a brief response to two very elaborate petitions for a rehearing but respectful to the zealous counsel who filed them, and befitting the cause of harmonious jurisprudence and judicial rectitude and authority. An anxious scrutiny of the facts and arguments urged in the petitions, and a careful reconsideration of the opinions they assail, having resulted in a more unanimous adherence to the essential facts and established principles which sustain it, we will proceed with a very summary exposition of the grounds of complaint, and of the true facts and right law on which it will be cheerfully left to rest for the vindication of its accuracy and justice. And in this condensed review the order of the attack will be observed.

1. The resulting trust, which is the corner-stone of the opinion, is denied rather irresolutely, without a denial of the indisputable facts, or the citation of any authority to countenance the negation. The condensed facts show: *first*, that for the most meritorious consideration of both gratitude and paternal duty, and also for a valuable consideration, as recited in the opinion, William Hoskins dedicated, in the hands of the purchaser of his homestead farm, ten thousand dollars, as a trust fund, to secure to his daughter Eliza a home of her own; *second*, that the purchaser paid out of the purchase-money the amount which, reinvested, bought Eliza's home, according to the requisitions of her father for that special purpose; *third*, that merely because he made the contract of reinvestment and was a protecting father, the legal title was conveyed to him without knowledge or consent, and on her complaining of that formal lodgement, he soothed her by the assurance that it was best, and that her title should be secured; *fourth*, that he forthwith put her into the exclusive possession of the land as her home,

and that he and the family and neighbors ever afterward recognized it as hers.

On these facts, did not a trust result to her use more certainly than it would have done had he merely, for his wife's relinquishment of dower alone, executed a covenant to do what he afterward faithfully did? And did not the consideration for the conveyance to her father proceed, therefore, *as much from her as it would have done had it been paid by her own hands?* The consideration from her on her account, and the title made to her father, nothing else appearing, implied a resulting trust, according to abundant authority not now controverted or doubted by scientific jurists; and such trusts, being excepted from the operation of the statute of frauds, may be established by oral testimony as satisfactorily as by written evidence. On this subject we will only refer to Story's Equity, and to Chancellor KENT's opinion in the case of *Boyd v. M'Clean*, 1 Johnson's Ch. 583, in which the Chancellor defines the principle of such trusts, and illustrates it by a collation of the leading cases *ab ovo*. And the trust enforced by him in that case was not as conclusively established as that which we recognize and uphold in this case.

2. The foundation being thus fixed, the superstructure is assaulted in the impotent form of estoppels, never pleaded in this entire suit, and of course never litigated. And the first of these, intimated for the first time in the petitions, is *Eliza's qualification* as executrix. Though she never acted, yet her *qualifying* alone is urged as an election to give up her right to her home. The idea of such an elective estoppel is a gross perversion of the principle of binding election, which is, that a devisee can not claim under and against the same will; and that, before a devisee can be required to make an election, the will must *clearly* show that *the testator so intended*. No such case is presented by the will of William Hoskins, nor did he so intend. He did not even devise Eliza's land at all.

In chapter 30, on Election, 2d volume on Equity Jurisprudence, Mr. STORY, after defining the principle, says, section 1075: "*Every case of election therefore supposes a plurality of gifts or rights, with an intention, express or implied, of the party who has a right to control one or both, that one should be a*

SUBSTITUTE *for the other.*" Then, illustrating the peculiar difficulty of making a clear case of election, he says, section 1086: "It may be stated that, in order to raise a case of election, there must be a *clear* intention expressed on the part of the testator to give that which is not his property. A mere recital in a will that A is entitled to certain property, but not declaring the intention of the testator to give it to him, would not be a sufficient demonstration of his intention to raise an election." Again, speaking of a bar to a wife's dower by a testamentary provision for her, he says, section 1088, that "such an intention must be *clear and free from ambiguity*; and it could not be inferred from the mere fact of the testator's making a general disposition of his property, although he should give his wife a legacy." And, speaking of the presumption of an actual election, he says, section 1098: "Before any such presumption can arise, it is necessary to show that the party acquiescing or acting was *cognizant of his rights*; and when this is ascertained affirmatively, it may be further necessary to consider whether *the party intended an election.*"

Tested by these established rules, there can be no rational doubt that there is nothing having the semblance of election in this case. Not only did the will not devise her home—unless to herself as residuary devisee—but its recital only that his debts were secured by mortgage does not allude to her land, or even intimate an expectation that a foreclosure would touch it. And it is almost certain that, when the will was proved, she did not know that her land was included in the mortgage; and it is clear that there can be no presumption of actual election. She never accepted or claimed any thing under the will, but cleaved to her land all the time; and not only was there no cause for election, but it is evident that she did not so understand. It is equally clear that she was, if even bound to elect, neither cognizant of her rights nor intended to elect to give up her home. The contrary is demonstrated by her conduct.

The next pretense of estoppel is, her bidding for the land and giving her bonds for the price bid. Had this been pleaded as an estoppel, she might have avoided its effect by sufficient proofs and explanations; but, not being pleaded, that question was not litigated. This shows the reason why an estoppel must

be pleaded before it can operate as such. But had it been pleaded, it would have been unavailing.

The decree of sale has been reversed by this Court, and is yet dead; and the reason why the sale also was not set aside, was that Mrs. Faris had not asked it, and as purchaser might not need or desire it. *Then* she asserted her rights under the resulting trust to avoid her obligation as bidder, and confined the litigation to the question whether she was liable for the price bid for her own land, which the mortgagees, procuring the mortgage with full notice of her equity, and against the free consent of the mortgagor, had no right to sell. This was permissible and proper, especially as the reversal of the decree for sale left nothing behind except the question of enforceability of her bonds given for her own property, and therefore for no valuable or binding consideration. The reasons why she bid at the sale, and gave her bonds, are sufficiently explained in the opinion; and certainly she did not intend thereby to waive her claim to the land as owner, but bid only to secure her title from disturbance. Nor were the mortgagees prejudiced by her conduct. They knew that they were wrongfully selling her land against her will; and had it even been sold to a stranger without notice of her right, if the sale as well as the decree for it had not been set aside, she would have certainly been entitled to reclamation against the mortgagees. We can not see, therefore, how her conduct in this respect would have forfeited any right for which she was still struggling openly, perseveringly, and confidently.

Then the trust being established, notice of it to the mortgagees when by evident misconception or coercion they improperly obtained the mortgage, the want of any proof of a waiver of her title, or of any estoppel against the assertion of it, and her non-liability for the price bid by her at the empty sale, should, as we adjudged, close the litigation so far as Mrs. Faris is concerned. Nothing more remains for litigation against her; and therefore we decided that the petition against her should be dismissed, and that the legal title to her land should be conveyed to her; and by this we will stand.

But as the mortgage debt does not appear to have been fully paid, and the mortgagor's estate may alone be liable for it, we authorized a transformed litigation between the executor, mort-

gagees, and W. A. Hoskins, with whom, as an alleged debtor of the mortgagor, she has been interpleading for the purpose of compelling him to pay the debt; and this subrogation and transposition is the best we can do for all parties to prevent multiplicity and injustice. But of this modification the counsel of W. A. Hoskins complains. Up to this stage of the conflict both of the petitioners were concurrent; *but here they diverge and become antagonistic*. This is just what we expected.

But why should W. A. Hoskins object to a continuation of the litigation in this modified form? It can not hurt him; nor can it be material to his interests, as now involved, whether his sister or the mortgagees are his antagonists; nor should he complain that our judgment leaves him on the bond after exonerating her. He has not denied her allegation that he advised her to buy the land, promised to be her surety, and to stand between her and the debts so incurred. Then, as between her and him, he now appears to stand in equity as the principal obligor; and, therefore, discharging her does not release him, unless the mortgagees shall fail to establish his alleged and *prima facie* indebtedness to the mortgagor. Holding him alone on the bonds is only precautionary, and can not increase his ultimate liability. If it shall finally appear that when he signed the bonds he owed the mortgagor nothing, then he, too, should be released from the obligation, as without consideration as to him any more than as to Mrs. Faris, and the mortgagees must stand as they would have stood if the mortgage had not included the land. All they can be entitled to beyond that limit, they must get from him, to the extent of his liability to his father. The litigation on this question, as commenced by Mrs. Faris, will only be continued, and so the opinion intends. He may make any defense against the mortgagees and the mortgagor's executor which he could make against the mortgagor himself, were he living and a party complaining. We are not inclined, therefore, to change the opinion in this branch of the case. Justice seems to require this ulterior litigation in this form.

And now we will only add that, having already heard all that could be expected from a reargument, and understanding the case as thoroughly as we could hope ever to understand it in all its phases, we deem it not only useless but unjust

further to prolong this litigation in this Court by granting a rehearing.

Wherefore both petitions for a rehearing are unanimously overruled (a).

(a) WHERE A RESULTING TRUST DOES ARISE.—*Miller and Wife v. Edwards*, 7 Bush, 394: To reinvest in a more desirable farm in Shelby County, the wife concurred with her husband in selling her Henry County land, and purchased the Shelby farm with the proceeds, *on the express condition that the title should be secured to her separate use*. Without her knowledge or consent, the legal title to the Shelby farm, for reasons consistent with his integrity, was conveyed to the husband. When, some time afterward, she discovered the apparent condition of the title, she concurred in the sale of the Shelby farm, and a reinvestment of a portion of the proceeds in a smaller place, to be secured to her as the other was to have been; but, without her knowledge or consent, the title was again conveyed to the husband, for reasons consistent with his honor. Discovering this error, she agreed to sell the smaller place for \$14,000, on the express condition that the notes for \$12,000 of the purchase price should be made payable to him for her separate use, and deposited with a stranger to keep for her. These notes were attached by creditors of her husband. *Held*: 1. That such a contract as that made with her husband before her land was sold, is valid and enforceable as between the parties to it. 2. That even without any explicit stipulation, an available trust *resulted by implication*, unaffected by the statute of frauds or of conveyances. 3. That the trust is not affected by the Revised Statutes, sec. 20, ch. 80, 2 Stanton, 230, because the title was conveyed to her husband against her will, and in violation of fiducial faith. [See note to *Faris v. Dunn*, page 300, for the provisions of the statute referred to.] 4. That there is no ground to presume that the husband ever intended to convert the wife's estate, or its proceeds, to his own use. As between themselves, therefore, all that remains is equitably as much hers as ever it was. 5. That before they became creditors, the attaching creditors had constructive notice of her rights, and a court of equity should not help them to divest her of this payment of her inheritance. In this case, with money given to her for her separate use, the wife purchased furniture in her own name, which was recognized by her husband as her own exclusive property. The furniture being attached by the husband's creditors,—*held*: 1. That though ostensibly in the husband's possession, and therefore technically his property, the furniture was nevertheless, and yet is, beneficially hers. 2. That no written memorial or registration in such a case is required by law. 3. That though a purchaser from the husband without notice might have been entitled to hold, yet. 4. That a mere creditor can not prevail against a wife's clear equity, citing *M'Clanahan v. Beasley*, 17 B. Monroe, 111.

Starr v. Wright, 20 Ohio State, 97: A father, to avoid creditors, conveyed to a minor son. Afterward, to enable the father to sell, he reconveyed, and the property was sold to a *bona fide* purchaser. The son, after becoming of age, sued. *Held*: the son held in trust, and could have been compelled to reconvey, and could not, under the circumstances, disaffirm his reconveyance so as to defeat the title conveyed by the father.

Campbell v. Corley, 1 De Gex and Jones, 238: An elderly lady married a barrister who had for some years been her confidential friend and adviser.

Before the marriage a lengthened correspondence took place between them, in which she insisted that her personal estate should be settled so as to be "hers as if unmarried," and hers "to give, to use, and to will." He assented to this, and undertook to prepare the settlement. By the marriage he acquired, under her father's will, a life interest, expectant on her decease, a considerable sum of stock. *Held*, that having undertaken to prepare the settlement, he was bound to prepare such a one as under the circumstances a conveyancer would have drawn or the court would have sanctioned; that such a settlement would have given him no interest in her absolute property in default of appointment by her; and that, she having died without making any disposition in his favor, he was a trustee of her personal estate for her next of kin.

WHERE A RESULTING TRUST DOES NOT ARISE.—"To establish an express trust by a deed absolute on its face, it is requisite that the evidence should be *clear, certain, and conclusive*, in proof, not only of the existence of the trust, and that too at the time of the conveyance, but also as to its terms and conditions," *Miller v. Stokely*, 5 Ohio State, 194. "It is not sufficient that circumstances should be in proof calculated to excite a suspicion, or even a probability, in the minds of some persons, that there might have been a trust; but the proof must show the existence of the trust *affirmatively*, and so *conclusively* as to remove all reasonable and well-founded doubts." "A deed for the conveyance of lands, absolute in its terms, and in consideration of love and affection, is repugnant to the existence of a trust; and if in opposition to the terms of such a deed, an express trust, *coupled with an interest*, could be set up and proved by circumstantial evidence, predicated on a supposed concealment or fraud, after the lapse of thirty years, it is essential that the evidence be so *certain and conclusive* as to exclude every rational hypothesis to the contrary, with the certainty of a positive declaration of the trust," *Ib.* 194. "An *implied or resulting* trust can not be shown against an absolute deed in consideration of natural love and affection, in writing," *Ib.* 192.

In a deed of conveyance to a son-in-law, the consideration stated was his marriage, and "natural love and affection" of the grantor for his daughter and the grantee; and the purpose expressed in the deed, was to advance the grantee in life. *Held*, that no trust in the estate conveyed arose in favor of the daughter, *Thompson v. Thompson*, 18 Ohio State, 73.

An antenuptial contract was entered into, whereby the husband was appointed trustee of real and personal property, and as such trustee was to have the entire and sole management, direction, and control thereof, but it was silent as to the persons to be beneficially interested in the trust. *Held*, that no trust was constituted which the court could execute; and that *it seems*, that when the instrument creating the trust does not disclose the beneficiary, it does not necessarily result that the creator of the trust is such beneficiary, *Dillaye v. Greenough*, 45 New York, 45.

WALKER v. WALKER'S EXECUTOR.

[Decided in the Supreme Court of the United States, at its December term, 1869, Associate Justice DAVID DAVIS delivering the opinion. The Court was composed of Chief Justice SALMON P. CHASE, and Associates SAMUEL NELSON, NOAH H. SWAYNE, DAVID DAVIS, WILLIAM STRONG, NATHAN CLIFFORD, SAMUEL F. MILLER, STEPHEN J. FIELD, and JOSEPH BRADLEY. Reported in 9 Wallace, 743.]

- A covenant by a husband for the maintenance of the wife, contained in a deed of separation between them, through the medium of trustees, where the consideration is apparent, must now be regarded on authority as valid, notwithstanding the serious objections to such deeds. It will accordingly be enforced in equity, if it appear that the deed was not made in contemplation of a future possible separation, but in respect to one which was to occur immediately, or for the continuance of one that had already taken place. And this especially if the separation was occasioned by the misconduct of the husband, and the provision for the wife's support was reasonable under the circumstances, and no more than a court before which she was entitled to carry her grievances would have decreed to her as alimony.
- The validity of such a covenant is not impaired by the fact that the deed contains a provision that, if the parties should afterward come together, the trust should remain and be executed in like manner as if they should remain separate.
- A husband may be chargeable as trustee with the income of his wife's separate property, and if he have received it from her to invest it for her, and have not invested it, he will be so charged at her suit, whether the income be of property which he has settled upon her, or be income from some other separate property of hers.
- The Federal courts, where they have jurisdiction, will enforce, for the furtherance of justice, the same rules in the adjustment of claims against ancillary executors, that the local courts would do in favor of their own citizens.
- A widow, by being a mere formal party to a deed of compromise between the heirs-at-law of a decedent and his residuary devisees, by which a specific sum is given to the former and the residue of the estate to the latter, does not estop herself from coming upon the estate with a claim for separate moneys of hers, received by her husband to invest for her, but which he did not so invest; she having done nothing to conceal her claim from the residuary devisees, and the "residue" which the heirs surrendered having been a residue after the proper settlement of the estate.
- Nor does she estop herself from asserting such a claim against her husband's executors, by her acceptance of a provision under his will which makes a limited provision for her, to be received, with income under a certain trust deed, in satisfaction of dower.
- The view of the court below upon an ancient item of account, somewhat obscure, and where there was but little evidence, not disturbed.

The estate of a husband, who had maltreated his wife, and obtained from her the income of her separate property under a promise to invest it for her, but who did not so invest it, charged after his death with interest, compounded annually, through a long term of years, and deprived of all commissions for services as trustee.

APPEAL from the Circuit Court for the District of Massachusetts. The case was this:

In September, 1845, Dr. William Walker, then a citizen of Charlestown, Massachusetts, without cause, compelled his wife and two of their children to leave his house. Before this time he had treated his wife with great harshness and cruelty, proceeding so far as to inflict personal violence upon her. This conduct entitled his wife, by the laws of Massachusetts, to a decree of divorce from bed and board, and for a proper allowance of alimony; and, with a view to obtain these, she applied to counsel to take legal proceedings against her husband. On learning this, Dr. Walker sought the advice of his friend, Uriel Crocker, and requested him to confer with a lawyer on the subject. This friendly service was performed by Mr. Crocker, and the conference resulted in recommending the husband to settle on his wife \$50,000, and that articles of separation between them be executed. It was considered that the sum agreed on was a suitable settlement under the circumstances, as nearly the same amount had been obtained by Dr. Walker from the estate of his wife's father, and as Dr. Walker was, independently of this, a person of fortune; his estate at the time having been between three and four hundred thousand dollars.

The parties adopted the recommendation of Mr. Crocker and his conferee, and on that basis the articles of separation were drawn up and executed. By these articles Dr. Walker transferred to trustees, in trust for his wife, the amount of property agreed upon, and directed the income to be paid to her during her life. This transfer was, however, on the express condition that Mrs. Walker should release her possibility of dower, when asked to do so, to all the real estate which he should sell during his life-time, and if she survived him, that she should release her right of dower to the entire estate. The trustees, on their part, covenanted to indemnify the husband from all payment of alimony thereafter, and the deed contained a stipulation that if the parties should afterward come together, the trust should

remain, and be executed in like manner as if they should live separate.

The parties continued to live apart, after the execution of these articles, until the month of April, 1846, when Mrs. Walker returned to her husband at his request, and again for a certain time lived with him.

The main controversy in this case grew out of transactions which occurred after Mrs. Walker thus returned to her husband's home.

The money was admitted to have been always paid by the trustees into Mrs. Walker's own hands. And that in September, 1846, when the first payment after her return to her husband's house was due under the deed of trust, Dr. Walker went to Mr. Crocker, the managing trustee, with an order for the money from his wife, and stated that she had agreed that he should invest the amount for her, with the sum of one thousand dollars previously paid to her at Crocker's request.

[The receipt by Dr. Walker of the subsequent payments, upon the agreement to invest the same for his wife, were proved by Miss Emily Walker, a daughter.]

At another time—having previously requested Crocker to defer the payment of a sum of money then due to his wife, on account of his apprehension that she would be unwilling to have it invested for her, as he wished to do—he desired Crocker to go to his house and pay his wife the money, as he had a good chance to invest it. In fact, the whole evidence made it clear that Dr. Walker received the income of his wife's estate from her hands on the condition that he would invest it, as received, for her benefit, and that he agreed to this condition.

Mrs. Walker lived with her husband until June, 1860, when she again abandoned his house on account of his cruel treatment of herself and their daughters, and remained away from him during the residue of his life.

After the separation in June, 1860, Dr. Walker went to reside in Newport, R. I., and died there in 1865, leaving more than a million of dollars of estate, and a will, which, after setting aside \$180,000 in trust, to secure from the income to his wife, with the rents of the \$50,000, settled in 1846, an annual income of \$3,000; and to his children the remaining income; and after various legacies, including that of most of his silver-

plate between his wife and daughters, left the residue of his estate to literary and scientific institutions. The provision made by his will for his wife was declared by the will to be "in full and in lieu of her dower."

Letters testamentary were granted on Dr. Walker's estate in Rhode Island; but letters ancillary were also granted in Massachusetts, where he had a large amount of personal property as well as in Rhode Island.

The granting of letters testamentary upon Dr. Walker's estate was opposed by his heirs-at law, and after the grant of the letters, they threatening to seek to have them vacated, a compromise was effected, and a deed executed accordingly, between the heirs and the residuary devisees, by which the former released to the latter, after the payment to themselves of a considerable sum of money, the residue of the estate, after payment of all debts and just claims upon it. Mrs. Walker was a formal party to this deed.

Mrs. Walker now, October term, 1865, filed a bill against her husband's executors, alleging a trust or investment as respected the moneys which she had paid into his hands, and calling for an account.

The executors, either by the answer or in the argument, set up as defenses to the bill:

1. That the original article of separation, having been a *voluntary agreement* of husband and wife to live separately, was invalid; and the trust created by it of course invalid also; that this especially was so as the instrument was construed by the other side, for that this construction made it his interest to oppose his wife's return to his house, since he would have then both to support her and to let her have the separate income also.

2. That as to the sums received from his wife, equity would not make Dr. Walker a trustee for her; that, if he could properly be a trustee at any time, yet that during the cohabitation of the parties the trust was suspended; moreover, that the evidence was insufficient to show any intention to make himself such trustee in fact; the bill not being filed until twenty years after the alleged promises were made, and the evidence to support it being chiefly that of the daughter, a witness naturally

inclined to the mother's side, and whose statements were largely colored by her opinions and feelings.

3. That Dr. Walker having died in Rhode Island, and his will having been proved there, this suit should have been brought there, and not in Massachusetts, where it was brought.

4. That Mrs. Walker, having been a party to the deed of compromise, was estopped from bringing this suit.

5. That by accepting the provisions of her husband's will, she had waived all right to maintain a suit like the present one.

The court below sustained the bill; held Dr. Walker a trustee to invest for his wife the income of the settled property received by him from her; and referred the case to a master for an account. The master charged Dr. Walker's estate accordingly, charging him also interest compounded annually, but allowed him commissions as trustee, \$1,682.38. He also allowed his estate a credit of \$2,400.

The Circuit Court affirmed this report, giving Mrs. Walker a decree for \$81,750.85; and Mrs. Walker appealed, asserting, among other things, that not only was Dr. Walker entitled to no commissions as trustee, but that his conduct was such as deserved severe treatment, and that interest ought to have been compounded semi-annually.

Messrs. *Sidney Bartlett* and *B. R. Curtis*, for appellant. Messrs. *Thomas* and *Hutchins*, for appellees. The additional point being made in this Court in behalf of Dr. Walker's estate, that under the General Laws of Massachusetts, ch. 97, sec. 16, the executors were not liable to this suit, because it was begun within one year after they gave bonds.

Mr. Justice DAVIS delivered the opinion of the Court: The bill here seeks to charge the estate of Dr. Walker, in the hands of his executors, with a trust in favor of his widow. The court below found that the trust existed and was valid, and this appeal seeks to review that decision as erroneous.

Two principal questions are presented for consideration:

1. Is the trust created by the articles of separation in this case valid, and will a court of equity enforce it?

2. Can a husband be a trustee for his wife? and if so, did Dr. Walker constitute himself such a trustee or not?

It is contended that deeds of separation between husband and wife can not be upheld, because it is against public policy to allow parties sustaining that relation to vary their duties and responsibilities by entering into an agreement which contemplates a partial dissolution of the marriage contract. If the question were before us, unaffected by decision, it would present difficulties, for it can not be doubted that there are serious objections to voluntary separations between married persons. But contracts of this nature, for the separate maintenance of the wife, through the intervention of a trustee, have received the sanction of the courts in England and in this country for so long a period of time, that the law on the subject must be considered as settled (a).

It is true that different judges, in discussing the question, have struggled against maintaining the principle; but while doing so they have not felt themselves at liberty to disregard it, on account of the great weight of authority with which it was supported, and have, therefore, uniformly adhered to it. It is unnecessary to consider whether the extent to which the doctrine has been carried meets our approbation, nor are we required to discuss the subject in any aspect which this case does not present. It is enough for the purposes of this suit to say, that a covenant by the husband for the maintenance of the wife, contained in a deed of separation between them, through the medium of trustees, where the consideration is apparent, is valid, and will be enforced in equity, if it appears that the deed was not made in contemplation of a future possible separation, but in respect to one which was to occur immediately, or for the continuance of one that had already taken place. And this is especially true if the separation was occasioned by the misconduct of the husband, and the provision for the wife's support was reasonable under the circumstances, and no more than a court,

(a) *Compton v. Collinson*, 2 Brown's Ch. 377; *Worrall v. Jacob*, 3 Merivale, 266; *Jee v. Thurlow*, 2 Barnewall and Creswell, 546; *Webster v. Webster*, 1 Small and Gif. 489; S. C. 23 English Law and Equity, 216; 17 Id. 278; *Randle v. Gould*, 8 Ellis and Blackburne, 457; *Carson v. Murray*, 3 Paige, 483; *Nichols v. Palmer*, 5 Day, 47; *Hutton v. Duey*, 3 Barr, 100; *Bettle v. Wilson*, 14 Ohio, 257; *Chapman v. Gray*, 8 Georgia, 341; *Reed v. Beazley*, 1 Blackford, 97; *Wells v. Stout*, 9 California, 494; *Dellinger's Appeal*, 35 Pennsylvania, 357; *Gaines v. Poor*, 3 Metcalfe (Ky.), 503; *Hunt v. Hunt*, judgment by Lord WESTBURY in 5 Law Times, 778.

before which she was entitled to carry her grievances, would have decreed to her as alimony. In this state of the law on the subject, it is clear the deed of settlement in controversy was unobjectionable. It is equally clear that the separation accomplished by it was the best thing for the parties at the time, and that it ultimately led to a reunion which lasted over fourteen years. The evidence shows that the bad conduct of Dr. Walker to his wife justified her in leaving him, and entitled her to a legal separation at the hands of a court, with alimony in proportion to the value of his estate. For many reasons, which are apparent without stating them, it was desirable, if possible, to avoid a judicial investigation; and accordingly negotiations to this end were commenced on the part of the husband, which resulted in securing to the wife a suitable provision for her support. This settlement was made by him and accepted by her, not only in lieu of alimony, which she could have obtained, but also in place of dower; and the covenant of the trustees against any future claim of alimony, and their agreement that the wife's debts should be paid out of the property conveyed to them, furnished the security to the husband for the permanent arrangement contemplated by the parties. If we consider that the value of the property transferred to the trustees for the benefit of the wife was but little more than the husband received in her right from her father's estate, and that, at the time, he was worth between three and four hundred thousand dollars, it would seem that the provision for the wife's maintenance was less than she had a right to demand and ought to have received. If the law authorizes a wife to leave her husband on account of cruel treatment, and to get from him a competent support, it can not withhold its sanction to the articles of separation concluded between these parties under the circumstances disclosed by the evidence in this case. It is insisted that the obligation of the trust was discharged when the wife returned to her husband's house, but this is a mistaken view of the effect of the instrument. It was the intention of the parties that the arrangement should be permanent, and to accomplish that purpose the agreement was framed so that the wife should enjoy her separate estate during life, although she should subsequently become reconciled to her husband, and cohabit with him. We can see no

valid objection to such a provision, and it is certainly supported by authority (a). The husband had a right to make a settlement upon his wife without any view to separation, and the insertion of this provision shows that he did not intend the settlement to cease on the return of the wife to cohabitation. There is no good reason why effect should not be given to the intention of the parties on the subject. If, on the grounds of public policy, it is desirable that the parties should be reconciled, whatever tends to promote such a result will receive the favorable consideration of a court of equity. Without this provision there was no inducement for Mrs. Walker to return to her husband; with it she could try to live with him again, and if his previous bad treatment was repeated, she was fortified against the contingency of being turned away another time penniless. There was nothing in his previous conduct to inspire her with confidence in his subsequent good behavior, and but for the fact that the means of support were secured to her in case her life became intolerable with him, it is reasonable to infer that she would never have ventured to cohabit with him after the separation. It is clear, then, that this trust was operative during the life of the wife, and that a court of equity will enforce it.

The next inquiry relates to transactions which occurred after the wife returned to her husband at his request, and on which the claim for relief in this case is based. That a husband may be a trustee for his wife, and can be compelled in equity to account for any money or property belonging to her which he has received, in the same manner that a stranger would be held to account, is a doctrine so well settled that it requires hardly a citation of authorities to sustain it (b).

It makes no difference whether the property which he has received was settled by him upon his wife, or came to her through other sources. If the property was her own separate and exclusive estate, and he has agreed to become her trustee respecting it, his liability attaches, and he will be charged with the trust.

(a) *Wilson v. Mushett*, 3 Barnewall and Adolphus, 743; *Bell on Husband and Wife*, 525-541.

(b) 2 Kent, 163, and cases cited; 2 Story's Equity, sec. 1380; *Neves v. Scott*, 9 Howard, 212; *Woodward v. Woodward*, 8 Law Times, N. S. 749; *Grant v. Grant*, 12 Id. 721.

The property settled upon Mrs. Walker by the articles of separation was her separate estate, and to be enjoyed by her in the same manner as if it had been conveyed to trustees for her benefit, by settlement before marriage. The income secured to her was not suspended by her returning to live with her husband, on his solicitation, nor had he any right to retain it by way of set-off against the expense of her living. If for any cause he desired the state of separation to cease, and invited his wife to return, it was his duty, as it should have been his pleasure, out of his abundant means, to have given her a decent support. What is the evidence touching the question whether Dr. Walker constituted himself the trustee for his wife, in respect to the income derived from her separate estate?

It is clear and uncontradicted, that Dr. Walker received the rents and incomes of his wife's estate, *from her*, on the condition, to which he agreed, that he would invest them for her benefit as they were received, and this agreement imposed on him the character of a trustee as to this property. To hold otherwise would be to sanction the grossest fraud. It is not necessary to create the trust, that the husband should use any particular form of words, nor need these words be in writing. All that is required is, that language should have been employed equivalent to a declaration of trust. That the words which Dr. Walker used constituted him the trustee of his wife, can not admit of controversy. An attempt is made to discredit the principal witness, by whom the important facts in this case are proved, but it has wholly failed. Her narrative of the occurrences which led to the separation, and of the transactions out of which the trust arises, is intelligently given, does not vary on cross-examination, and bears the impress of truth.

It is insisted that this suit should have been brought in Rhode Island, because Dr. Walker had his domicile in that state when he died, and his will is proved there. But the will was also proved in Massachusetts, where ancillary administration was obtained; and if, as is conceded in such a case, the assets received and inventoried by the executors there are liable to the claims of the citizens of Massachusetts, the citizens of other States will be placed on the same footing in this respect, in the Federal courts sitting in Massachusetts, where there is no

suggestion of insolvency. The Circuit Courts of the United States, with full equity powers, have jurisdiction over executors and administrators, where the parties are citizens of different States, and will enforce the same rules in the adjustment of claims against them that the local courts administer in favor of their own citizens (a).

It is urged that Mrs. Walker is estopped from setting up this claim, because she was a party to the indenture of compromise. But if so, she was only a formal party to it, received nothing under it, and was not concerned with the residue of the estate, which it proposed to adjust only after the debts, legacies, and liabilities were paid. Having done nothing to conceal her claim, nor imposed upon the parties to the compromise respecting it, she can not be considered as having waived her right to prosecute it.

But if this defense is overruled, it is nevertheless contended that Mrs. Walker, by accepting the provisions of her husband's will, waived her right to institute this suit. But this is giving an effect to the acceptance not warranted by the terms of the will, or any thing connected with the case. Dr. Walker, in his will, saw fit to make a limited provision for his wife, and to declare that it was to be received, with the income under the trust deed, in full satisfaction of dower in his estate. Nothing is said about the other trust, under which he received the separate property of his wife to be invested, and it is hard to see how his estate can be released from accounting for it, or the status of the complainant affected, because she consents to take under the will what is given her in satisfaction of dower.

It is objected that the executors are not liable to this suit, because it was commenced within one year after they gave bonds for the discharge of their trust. But this defense is not now open to the respondents. To have availed themselves of it, it was necessary that it should have been presented at the earliest stage of the proceedings. In not doing so, they will be considered as having waived their right to insist that the suit was brought too soon.

The remaining questions in this case relate to the exceptions

(a) *Green's Administrator v. Creighton*, 23 Howard, 90; *Harvey v. Richards*, 1 Mason, 381.

of the parties to the master's report. In dealing with these exceptions, it seems to us that all we are required to notice are embraced in three different points of inquiry:

1. Did the master err in allowing Dr. Walker \$2,400, as a deduction from the income of the trust property?

2. Should the interest charged against the trustee be compounded annually, or semi-annually?

3. Was the trustee entitled to any compensation for his services?

The solution of the first inquiry depends on the effect to be given to the receipt or memorandum signed by the complainant, dated March 27, 1847. The complainant insists, in the adjustment of the account the master mistook the effect of the instrument, and that he should have allowed as a credit against her \$1,500, instead of \$2,400. It is not easy, after this lapse of time, to tell the exact basis on which the accounts should be settled with reference to this receipt. It was a memorandum made when the parties were living in harmony, and after Dr. Walker had undertaken to invest for his wife the first check delivered to him by her, and after her purpose was manifest that the entire income of her estate should be invested to provide against the contingencies of the future. And yet this memorandum shows that she so far modified this purpose as to authorize her husband to give for her \$1,200 to each of her two sons, and expressed the intention of making an equal donation to her other children. The matter was probably adjusted between the parties, and, although there is no proof on the subject, the Circuit Court, doubtless, in approving this part of the master's report, acted on the idea that by long acquiescence it should be treated as having been settled. We can not say that this view of the subject is wrong, and the exception is, therefore, overruled.

2. The next exception relates to the manner of computing interest. That Dr. Walker acted in utter disregard of his trust, is too plain for controversy. He treated the money as his own; neither kept nor rendered any account of his trust; and his conduct throughout is irreconcilable with the intention to perform his agreement. There is not a shadow of excuse for his neglect. The reason assigned for it to his daughter, when on

his sick-bed, that he had not been able to find safe investments for the money, was the merest pretense. It could not be otherwise, as he was an intelligent man, of large wealth, and well informed on the subject of investing moneys. The condition of his estate shows that he had abundant opportunities for profitable investment on his own account; and if so, how can it truthfully be said he could not find safe investments for the small sums in his hands belonging to his wife? A court of equity, the especial guardian of trusts, will not tolerate excuses of this sort, on the part of a trustee, for omitting to discharge his duty to his *cestui que trust*. There is, therefore, no hesitation in the court to allow, in the adjustment of the trustee's account, the interest to be compounded annually. It has been argued, with earnestness, that this is a case for severe treatment, and that the master should have allowed semi-annual rests; but we are not at liberty to discuss the subject, as the Court are equally divided in opinion upon the question which it presents.

3. The master was wrong in allowing any compensation to the trustee for his services; and the exception taken to that part of the report is, therefore, sustained. To hold that, in a case like this, the trustee should be allowed compensation, when he literally did nothing toward executing his trust, but, on the contrary, was guilty of the grossest abuses concerning it, would be a departure from correct principle. The sustaining this exception renders a modification of the decree in the Circuit Court necessary. That court passed a decree in favor of the complainant for \$81,750.85. It should have been increased by the addition of \$1,682.38, which sum was deducted, in the account stated, for the trustee's services. The decree of the Circuit Court is, therefore, modified, on the basis that the complainant, at the time it was rendered, was entitled to recover from the respondents the sum of \$83,433.23.

Interest will follow from the date of the decree, at the rate allowed on judgments and decrees in Massachusetts.

ARTHUR KING, RESPONDENT, v. CHARLES N. TALBOTT, EXECUTOR, *et al*, AND DAVID W. OLYPHANT, ADMINISTRATOR OF DAVID W. C. OLYPHANT, EXECUTOR OF CHARLES W. KING, DECEASED, APPELLANTS.

ANNA HENRIETTA KING, RESPONDENT, v. THE SAME, APPELLANTS.

CHARLOTTE E. KING, EXECUTRIX OF WILLIAM V. KING, DECEASED, RESPONDENT, v. THE SAME, APPELLANTS.

[*Decided at the March term, 1869, of the Court of Appeals of New York, Judge LEWIS B. WOODRUFF delivering the opinion. Reported in 40 New York (Hand's), 76.*]

The law, in this State, imposes upon trustees, holding trust funds for investment for the benefit of minor children to be supported from the income accruing therefrom, the duty of placing them in a state of security, of seeing that they are productive of interest, and of so keeping them, that they may always be subject to future recall, for the benefit of the *cestui que trust*.

The investment of such funds by a trustee in canal, bank, insurance, railroad, or other stocks of private corporations, is a violation of his duty and the obligation of his trust.

As to money held upon trust of this kind, it is not according to the nature of the trust, nor within any just idea of prudence, to place the principal of the fund in a condition in which it is necessarily exposed to the hazard of loss or gain, according to the success or failure of the enterprise in which it is embarked, and in which, by the *very terms of the investment*, the principal is not to be returned at all.

Accordingly, *held* (all the judges concurring), that where the interest upon certain legacies were, by the terms of the will, to be applied by the executors, so far as required, to the maintenance and education of the legatees during their minority, and the principal, with any accumulations thereon, to be paid to them severally on their coming of age, and the executors, upon whom the trust was imposed, invested the funds in stock of the Delaware and Hudson Canal Company, the New York and Harlem Railroad Company, New York and New Haven Railroad Company, the Bank of Commerce, and the Saratoga and Washington Railroad Company, the legatees, upon coming of age, were not bound to accept such investments, but had the right to call upon the executors to pay over the whole amount of their legacies and interest thereon.

Held, further, that the proper rate of interest, with which the executors are to be charged in such case, is six per cent, with annual rests.

The proper mode of making up the interest account upon this basis, where the executors, have made advances for the maintenance of the legatees during their minority, stated.—WOODRUFF, J.

It seems, that *cestuis que trust*, in the case of improper investments, which are divisible, are not limited to rejection of *all* or *none* of them, but may accept such as they choose and reject the others.—WOODRUFF, J.

Where no provision is made by a testator for the support of his minor children, other than by the income to be derived from the legacies bequeathed to them, as between the legatees and the estate, such legacies draw interest from the death of the testator.

In this State, a trustee holding funds for investment for the benefit of minor children, must invest in Government or real estate securities. Any other investment would be a breach of duty, and the trustee personally liable.—MURRAY, GROVER, DANIELS, and JAMES, J. J. Contra, HUNT, C. J., MASON, and LOTT, J. J.

These appeals were argued together on the 6th day of January, 1869, and decided on the 18th of March, 1869.

THESE were actions brought separately by William Vernon King, Anna Henrietta King, and Arthur King, the three children of Charles W. King, deceased, against the surviving executor and the administrator of a deceased executor of said Charles, for an account of the moneys due them respectively, for the principal and accumulations of their respective legacies under their father's will, and for the payment over of the amounts found due. The causes were tried together at special term, before a justice of the Supreme Court, from whose decrees all parties appealed to the general term, where they were affirmed, without costs of appeal. The defendants appealed to this Court. The plaintiffs also brought cross-appeals from that part of the decrees, allowing interest to the defendants on their payments for maintenance of the plaintiffs' postponing interest on the legacies, until a year from the testator's death, and some other minor credits.

William Vernon King died after the commencement of his action; and his executrix was substituted as the plaintiff.

Charles W. King, the father, died on a voyage from Ceylon to Suez, September 26, 1845, leaving a widow and these three children, all then infants. By his will, made at Macao, he bequeathed to each of his three children the sum of \$15,000; "the interest on the same, so far as required, to be applied to their maintenance and education, and the principal, with any accumulations thereon, to be paid to them severally on their majority." He intrusted to the "discretion" of his executors, "the settle-

ment of my affairs, and the investment of my estate for the benefit of my heirs." The defendants named, and who qualified as his executors, had been his partners in business, both at New York and in China.

The will was proved abroad, and letters issued December 5, 1846. The executors, prior to December 31, 1849, had possessed themselves of the estate, to the amount of over \$105,000. On the 16th day of December, 1847, they filed an inventory amounting to over \$106,000. They did not collect or have in their hands for investment so large an amount as 45,000, until June 9, 1847. No account has ever been rendered by them to the surrogate of their administration.

Between March 5 and December 19, 1847, the executors invested, in United States treasury-notes and Ohio State bonds, a sum exceeding \$45,000 of the moneys of the estate. Between August 1, 1848, and November 10, 1849, they sold \$41,986 of said investment, at a profit of \$1,312.77, and reinvested the money realized from such sales in Delaware and Hudson Canal Company stocks, Saratoga and Washington Railroad Company stocks, New York and New Haven Railroad Company stocks, Harlem Railroad Company stocks, Hudson River Railroad Company bonds, and Bank of Commerce stock and scrip, for account of the children.

On the 1st day of April, 1850, they set apart for the children, as an investment of their legacies, the following stocks and bonds, constituting a portion of the aforesaid investments, at an estimated valuation equal to the price paid by them: \$4,000 of Ohio 7 per cent stocks, at 103, and $\frac{1}{4}$ brokerage, \$4,130; \$3,500 of Ohio 5 per cent stocks, at 92, and $\frac{1}{4}$ brokerage, \$3,228.75; 45 shares of the stock of the Delaware and Hudson Canal Company, and five shares of scrip stock of said company, at \$7,758.75; 40 shares Saratoga and Washington Railroad Company stock, at \$3,411.70; 200 shares preferred stock, New York and Harlem Railroad Company, at \$10,025; \$10,000 in amount in bonds of Hudson River Railroad Company, \$9,687.50; 125 shares of the scrip stock of the Bank of Commerce, \$4,306.25; 30 shares stock New York and New Haven Railroad Company, \$2,482.50; making, in all, \$45,390.45. And they opened an account of these investments with the children, and

debited it with the \$45,390.45, and also the income therefrom, and credited the same with payments made for the support and maintenance of said children. They, on the same day, paid over the balance of the estate to the residuary legatee.

The Ohio 7 per cents were redeemed in January, 1852; and the Ohio 5 per cents were redeemed in January, 1857; and the proceeds invested in Bank of Commerce scrip and New York Central bonds.

It was found by the judge who tried the causes, that, at the time these investments were made, and at the time said stocks and bonds were set apart, as well as at the time the others were subsequently purchased, the stocks and bonds were in good repute, and were considered by men, upon whose judgment it was proper to rely, as safe and desirable investments. The investments were made and set apart in good faith, the executors having invested their own funds in similar stocks, and retained the same.

D. W. C. Olyphant, one of the executors, died in June, 1851, and the defendant Olyphant was appointed administrator of his estate.

The testator made no provision for the support of his children other than that contained in his will. From his death to April, 1850, they resided with their mother. The income, which had been realized from the investments of the estate up to April 1, 1850, was divided by the executors between the mother (residuary legatee) and the children, in the proportions in which they were respectively entitled to the estate, and some advances for maintenance of the children made in addition.

The children now reject the stock investments made by the executors, and claim that the defendants should be made liable for all moneys invested in these stocks, with interest from the death of the testator, and for all profits resulting from their dealings with such moneys, and bring these actions to enforce such claims.

The court, at special term, decided that it was the duty of the executors, within a reasonable time after the receipt of a sufficient amount of funds belonging to the estate, to invest the amount of the legacies in the stocks of the United States, and of the State of New York, and keep the same so invested; and

having failed to do so, their investments were invalid, and the executors were personally liable for the amount of the legacies, with compound interest from September 1, 1846, at 7 per cent. It also held, that the conduct of the executors was in good faith, and without fraud; the children must, therefore, reject *all* or *none* of the investments; and that the executors were entitled to commissions. It was referred to a referee, to make up an account, charging the executors with the legacies, on the 26th of September, 1846 (one year from the death of the testator), and with interest thereon, at 7 per cent, from that date, *computed with annual rests*. The referee stated an account upon this basis, crediting the executors with their payments, for maintenance and support of the children, each year, and interest on such payments, from the date of each, to the ensuing 26th of September, when such payments, with the commissions and interest, were deducted from the amount of the legacies, and the year's interest then accrued upon them, and the executors were debited with the balance, as a new principal. From that, increased by a year's interest thereon, to the ensuing 26th of September, again, the amount of their payments in the mean time, with interest and commissions, were deducted, leaving a new principal, and so on, to the final balance. The decree was entered in accordance with this report.

Stephen P. Nash, for the appellants. *George N. Titus*, for respondents.

WOODRUFF, J.: It is conceded that, in England, the rule is, and has long been settled, that a trustee, holding funds to invest for the benefit of his *cestui que trust*, is bound to make such investment in the public debt, for the safety whereof the faith of their Government is pledged; or in loans, for which real estate is pledged as security. And that, although the terms of the trust commit the investment, in general terms, to the discretion of the trustee, that discretion is controlled by the above rule, and is to be exercised within the very narrow limits which it prescribes.

As a purely arbitrary rule, resting upon any special policy of that country, or on any peculiarity in its condition, it has no application to this country. It is not of the common law. It

had no applicability to the condition of this country, while a colony of Great Britain, and can not be said to have been incorporated in our law.

So far, and so far only, as it can be said to rest upon fundamental principles of equity, commending themselves to the conscience, and suited to the condition of our affairs, so far, it is true that it has appropriate application and force, as a guide to the administration of a trust, here, as well as in England.

I do not, therefore, deem it material to inquire, through the multitude of English cases, and the abundant texts of the law writers, into the origin of the rule in England, or the date of its early promulgation. Nor, in this particular case, do I deem it necessary to determine whether it should, by precise analogy, be deemed to prohibit here investments in any other public debt than that of the State of New York.

Neither, in my judgment, are we at liberty, in the decision of this case, to propound any new rule of conduct, by which to judge of the liability of trustees, now subjected to examination. Under trusts heretofore created, the managers thereof performed their duty with the aid of rules for the exercise of their discretion, which were the utterance of equity and good conscience, intelligible to their understanding, and available for their information; otherwise, trusts heretofore existing have been traps and pitfalls to catch the faithful, prudent, and diligent trustee, without the power to avoid them.

But it is not true, that there is no underlying principle or rule of conduct in the administration of a trust, which calls for obedience. Whether it has been declared by the courts or not, whether it has been enacted in statutes or not, whether it is in familiar recognition in the affairs of life, there appertains to the relation of trustee, and *cestui que trust*, a duty, to be faithful, to be diligent, to be prudent, in an administration intrusted to the former, in confidence in his fidelity, diligence, and prudence.

To this general statement of the duty of trustees, there is no want of promulgation or sanction, nor want of sources of information for their guidance. In the whole history of trusts, in decisions of courts for a century in England, in all the utterances of the courts of this and the other States of this country,

and not less in the conscious good sense of all intelligent minds, its recognition is uniform.

The real inquiry, therefore, is, in my judgment, in the case before us, and in all like cases, Has the administration of the trust, created by the will of Charles W. King, for the benefit of the plaintiff, been governed by fidelity, diligence, and prudence? If it has, the defendants are not liable for losses which, nevertheless, have happened.

This, however, aids but little in the examination of the defendant's conduct, unless the terms of definition are made more precise. What are fidelity, diligence, and discretion? and what is the measure thereof, which trustees are bound to possess and exercise?

It is hardly necessary to say, that fidelity imports sincere and single intention to administer the trust for the best interest of the parties beneficially interested, and according to the duty which the trust imposes. And this is but a paraphrase of "good faith."

The meaning and measure of the required prudence and diligence has been repeatedly discussed, and with a difference of opinion. In extreme rigor, it has sometimes been said that they must be such and as great as that possessed and exercised by the Court of Chancery itself. And, again, it has been said that they are to be such as the trustee exercises in the conduct of his own affairs, of like nature; and between these is the declaration that they are to be the highest prudence and vigilance, or they will not exonerate.

My own judgment, after an examination of the subject, and bearing in mind the nature of the office, its importance, and the considerations which alone induce men of suitable experience, capacity, and responsibility to accept its usually thankless burden, is, that the just and true rule is, that the trustee is bound to employ such diligence and such prudence in the care and management as, in general, prudent men, of discretion and intelligence in such matters, employ in their own like affairs.

This necessarily excludes all speculation, all investments for an uncertain and doubtful rise in the market, and, of course, every thing that does not take into view the nature and object

of the trust, and the consequences of a mistake in the selection of the investment to be made.

It, therefore, does not follow that, because prudent men may, and often do, conduct their own affairs with the hope of growing rich, and therein take the hazard of adventures which they deem hopeful, trustees may do the same; the preservation of the fund, and the procurement of a just income therefrom, are primary objects of the creation of the trust itself, and are to be primarily regarded.

If it be said, that trustees are selected by the testator, or donor of the trust, from his own knowledge of their capacity, and without any expectation that they will do more than, in good faith, exercise the judgment and discretion they possess, the answer is: *First*, the rule properly assumes the capacity of the trustees to exercise the prudence and diligence of prudent men, in general; and, *second*, it imposes the duty to observe and know, or learn, what such prudence dictates in the matter in hand.

And, once more, the terms of the trust, and its particular object and purpose, are, in no case, to be lost sight of in its administration.

Lewin, in his Treatise on the Law of Trusts, etc., page 332, states, as the result of the several cases, and as the true rule, that "a trustee is bound to exert *precisely* the same care and solicitude, in behalf of his *cestui que trust*, as he would do for himself; but *greater* measure than this a court of equity will *not* exact." In general, this is true; but if it imports that, if he do what men of ordinary prudence would not do in their own affairs of a like nature, he will be excused on showing that he dealt with his own property in like want of discretion, it can not be sustained as a safe or just rule toward *cestuis que trust*; nor is it required by reasonable indulgence to the trustee; it would be laying the duty to be prudent out of view entirely, and I can not think the writer intended it should be so understood.

The Massachusetts cases, 9 Pickering, 140; 20 Pick. 116, cited by the counsel for the defendants, are in better conformity with the rule as I have stated it.

To apply these general views to the case before us, and with the deductions which necessarily flow from their recognition:

The testator gave to each of his children fifteen thousand dollars, the *interest* on the same, so far as required, to be applied to their maintenance and education, and the *principal*, with any accumulations thereon, to be paid to them severally on their majority; appointed the defendant Talbott, and his partner, Mr. Olyphant, executors, "intrusting to their discretion the settlement of my affairs, and the investment of my estate for the benefit of my heirs."

If I am correct in my views of the duty of trustees, this last clause neither added to, nor in any wise affected, the duty or responsibility of these executors; without it, they were clothed with discretion; with it, their discretion was to be exercised with all the care and prudence belonging to their trust-relation to the beneficiaries. Such is the distinct doctrine of the cases very largely cited by the counsel for the parties, and is, I think, the necessary conclusion from the just rule of duty I have stated.

What, then, was the office of the trustees, as indicated by the terms and nature of the trust? If its literal reading be followed, it directed that "fifteen thousand dollars" in money be placed at "interest." The nature of the trust, according to the manifest intent of the testator, required that, in order to the maintenance and support of infant children, whose need in that regard would be constant and unremitting, that interest should flow in with regularity, and without exposure to the uncertainties or fluctuations of adventures of any kind. And then the fund should continue, with any excess of such interest accumulated for their benefit, so as to be delivered at the expiration of their minority.

Palpably, then, the *first* and obvious duty was to place that fifteen thousand dollars in a state of security; *second*, to see to it that it was productive of interest; and, *third*, so to keep the fund, that it should always be subject to future recall for the benefit of the *cestuis que trust*.

I do not attach controlling importance to the word "interest," used by the testator, but I do regard it as some guide to the trustees, as an expression of the testator, that he did not contemplate any adventure with the fund, with a view to profits as such.

But, apart from the inference from the use of that word, I think it should be said, that whenever money is held upon a trust of this description, it is not according to its nature, nor within any just idea of prudence, to place the principal of the fund in a condition in which it is necessarily exposed to the hazard of loss or gain, according to the success or failure of the enterprise in which it is embarked, and in which, by the *very terms of the investment*, the principal is not to be returned at all.

It is not denied that the employment of the fund as capital, in trade, would be a clear departure from the duty of trustees. If it can not be so employed under the management of a co-partnership, I see no reason for saying that the incorporation of the partners tends, in any degree, to justify it. The moment the fund is invested in bank, or insurance, or railroad stock, it has left the control of the trustees; its safety and the hazard, or risk, of its loss, is no longer dependent upon their skill, care, or discretion, in its custody or management, and the terms of the investment do not contemplate that it ever will be returned to the trustees (a).

If it be said that at any time the trustees may sell the stock (which is but another name for their interest in the property and business of the corporation), and so repossess themselves of the original capital, I reply, *that* is necessarily contingent and uncertain; and so the fund has been voluntarily placed in a condition of uncertainty, dependent upon two contingencies: *First*, the practicability of making the business profitable; and, *second*, the judgment, skill, and fidelity of those who have the management of it for that purpose.

If it be said that men of the highest prudence do, in fact, invest their funds in such stocks, becoming subscribers and

(a) A testator made a bequest to his nephew, of a part of an uncollected fund, "in trust, however, to manage, invest, and pay over to his brother Jarrett and to his children, from time to time, as he for the best interest of him or them from time to time shall deem most beneficial." *Held*: 1. That the trustee was authorized to invest and reinvest this fund in any kind of property, according to his discretion, and might, by sale or otherwise, change the property "from time to time," as he might deem most advantageous; and, 2. That all the beneficiaries are coequal participants in the trust fund, and in the distribution of its benefits. The only discretion confided to the trustee, in this respect, is in the time and mode of allotment to each, or enjoyment by each, but altogether and finally approximating equality as near as possible, *Luzon v. Wilgus*, 7 Bush, 205.

contributors thereto, in the very formation thereof, and before the business is developed, and in the exercise of their judgment, on the probability of its safety and productiveness, the answer is, so do just such men, looking to the hope of profitable returns, invest money in trade, and adventures of various kinds. In their private affairs they do, and they lawfully may, put their principal funds at hazard; in the affairs of a trust they may not. The very nature of their relation to it forbids it.

If it be said that this reasoning assumes that it is certainly practicable so to keep the fund that it shall be productive, and yet safe against any contingency of loss; whereas, in fact, if loaned upon bond and mortgage, or upon securities of any description, losses from insolvency and depreciation may, and often do, happen, notwithstanding due and proper care and caution is observed in their selection,—not at all. It assumes and insists, that the trustees shall not place the fund where its safety and due return to their hands will depend upon the success of the business in which it is adventured, or the skill and honesty of other parties intrusted with its conduct; and it is in the selection of the securities for its safety and actual return, and there is scope for discretion and prudence, which, if exercised in good faith, constitute due performance of the duty of the trustees.

My conclusion is, therefore, that the defendants were not at liberty to invest the fund, bequeathed to the plaintiff, in stock of the Delaware and Hudson Canal Company; of the New York and Harlem Railroad Company; of the New York and New Haven Railroad Company; of the Bank of Commerce; or of the Saratoga and Washington Railroad Company; and that the plaintiff was not bound to accept these stocks, as, and for, his legacy, or the investment thereof.

In regard to the bonds of the Hudson River Railroad Company, and of the Delaware and Hudson Canal Company, it appears by schedule B, given in evidence, that the former were mortgage bonds; but what was the extent or sufficiency of the security afforded by such mortgage, or what property was embraced in it, does not appear, nor does it appear whether there was any security whatever for the payment of the canal company's bonds. It is not necessary for the decision of this case;

and I am not prepared to say, that an investment in the bonds of a railroad, or other corporation, the payment whereof is secured by a mortgage upon real estate, is not suitable and proper under any circumstance.

If the real estate is ample to insure the payment of the bonds, I do not, at present, perceive that it is necessarily to be regarded as inferior to the bond of an individual, secured by mortgage; it would, of course, be open to all the inquiries which prudence would suggest if the bond and mortgage were that of an individual. The nature, the location, and the sufficiency of the security; and the terms of the mortgage, and its availability for the protection and ultimate realization of the fund, must, of course, enter into the consideration.

But it is not necessary to pursue that subject. The plaintiff, in his complaint, rejects the entire investment. The court below held, that it was equitable that the plaintiff should be held to receive the whole or none of the stocks and bonds, and to that ruling neither the plaintiff nor the defendants have excepted; and therefore the question, whether the judgment below was correct in that respect, is not before us. It is proper, however, to say, that I do not clearly apprehend the propriety of that ruling, unless it be on the ground that the plaintiff, in his complaint, did so elect.

The rule is perfectly well settled, that a *cestui que trust* is at liberty to elect to approve an unauthorized investment, and enjoy its profits, or to reject it, at his option; and I perceive no reason for saying that, where the trustee has divided the fund into parts and made separate investments, the *cestui que trust* is not at liberty, on equitable as well as legal grounds, to approve and adopt such as he thinks it for his interest to approve. The money invested is his money; and in respect to each and every dollar, it seems to me, he has an unqualified right to follow it, and claim the fruits of its investment, and that the trustee can not deny it. The fact that the trustee has made other investments of other parts of the funds, which the *cestui que trust* is not bound to approve, and disaffirms, can not, I think, affect the power. For example, suppose, in the present case, the *cestui que trust*, on delivery to him of all the securities and bonds in which his legacy had appeared invested, had declared:

Although these investments are improperly made, not in accordance with the intent of the testator, nor in the due performance of your duty, I waive all objection on that account, except as to the stock of the Saratoga and Washington Railroad Company. That I reject, and return to you. Is it doubtful that his position must be sustained? The result is, that the main features of the judgment herein must be affirmed.

The testator died abroad September 26, 1845. The will was proved in chancery October 30, 1846, and letters testamentary were issued December 5, 1846, and the inventory of the estate made and filed the 16th day of December, 1847. It is expressly found by the court, that the executors did not collect, or have in their hands for investment, a sum sufficient to pay the three legacies in question, until June 9, 1847. No fault or negligence is imputed to the executors in this respect. The trustees were, therefore, not under any duty to make the investment of the legacies before that time.

The question, whether these legacies bore interest, as a provision for the support of children dependent thereon for their maintenance, is a very different question from the inquiry, whether, as trustees, the executors were chargeable with interest, as income from the legacy itself.

As between the children and the estate, the legacies unquestionably bore interest from the death of the testator; but as between them and the trustees of the legacy, only from the time when the legacy, as such, was or ought to have been invested.

Whatever sums, therefore, the executors paid to the mother of these children for their support and maintenance, was properly charged to the children; and it is not of the slightest importance, whether it was paid under the name of payment for their support, or as residuary estate, upon which it was properly chargeable.

Had the trustees of the legacy been other and different persons from the executors, I do not perceive that the latter could have refused to pay to the trustees, out of the estate in their hands, interest on the legacy, until they were prepared to pay it over for investment. Interest should, therefore, be allowed upon the legacy from the death of the testator. It is payable

out of the estate, irrespective of the question whether the estate was itself producing income in the hands of the executors, and against the executors as such, it should be allowed only down to June 5, 1847, when there were funds to be paid over and invested, as and for the plaintiff's legacy. But, as the executors and trustees are the same, there is no occasion to make a rest at that date; it should be assumed in the trustees' account, that the interest was received annually.

I think it entirely clear, that the account should be stated with annual rests. So nearly as may be, the plaintiff is entitled to such benefit as he would have derived from an investment of his legacy. The testator expressly directs, that the surplus of interest, not required for maintenance, be accumulated. This devolved on the trustees the duty to invest such surplus, from year to year. Had the trustees made the investment of the principal in the manner which I think was their duty, and it had appeared that small amounts of surplus income necessarily remained unproductive in their hands, such necessity would excuse them from any charge for interest thereon; they would not be charged for income, which by reasonable diligence they could not obtain; but, the duty to invest being clear, we have no alternative, in the absence of such actual investment, but to treat the investment, for the purposes of the accounting, as made when it ought to have been made; that is, at the end of each year.

The manner in which the account was stated by the court below, unless I misunderstand it, rendered it not only proper, but necessary, to allow interest upon the payments made by the executors for maintenance, for by making the whole annual income bear interest from the moment it was received (or, as a charge to the trustees, became due, which is the same thing), the payments, in each year, were practically made advances, in anticipation of the interest, which would be payable at the end of that year; and, therefore, as the trustees were charged interest on the previously accrued income, out of which maintenance was to be provided, that charge must be counterbalanced by an allowance of interest, *pro tanto*, for so much as was applied to maintenance.

The principle for which the plaintiff contends is unquestionable correct, viz: That at no time, when the trustees make

payments for maintenance, with income in hand not bearing interest, should they be allowed interest on such payments.

The accurate and just mode of stating the accounts, is to credit the plaintiff, on the day of the decease of the testator, September 26, 1845, with the amount of the legacy. At the end of the year interest will have accrued for twelve months, to be then—that is, September 26, 1846—credited. Any payments for support, during that twelve months, should be regarded as an advance, and should, therefore, bear interest; and on the 26th September, 1846, the balance being struck, it will appear how much of income remains for the support of plaintiff for the ensuing year. But as that, or a then unknown portion thereof, will be required during such ensuing year, the trustees would not, had it been received from actual loans duly made, be required to invest it, but to retain it for such support. If, however, at the end of such year—that is, September 26, 1847—any portion of it remained unexpended, then such remainder should be added to the principal, for accumulation, and bear interest. On that same date, September 26, 1847, the interest for the year ending that day will have accrued, and that, in turn, should be held for the support of the plaintiff for the year immediately ensuing; at the end of which—to-wit, September 26, 1848—if any remained, such remainder should be added to the principal, as an accumulation.

The rule being, that advances for support, without income in hand, should bear interest; advances for support, with income in hand, should not bear interest; and the income becoming due at the end of the year is not to be forthwith invested, or made to bear interest, but may properly be held by the trustees, to meet the charge for the support of the plaintiff for the then coming year; and if any portion thereof remained at its end, such remainder should then, and not till then, be carried to the principal, and bear interest. Assuming the items correct, as they appear in the account stated by the referee, this will entitle the defendants to be credited, in the years 1846, 1847, 1848, 1849, and in 1859, 1864, and 1865, on the excess of their payments for support, over the amount of uninvested income in their hands at the beginning of the year.

I am aware that the mode of keeping the account, among

merchants, is to charge interest on both sides of the account; but the plaintiff insists that this makes him pay interest for his support, when the trustees have income in hand. The mode of stating the account I have proposed, is, I think, literally just and exact, and is not liable to any such criticism.

The remaining inquiry is, At what rate should interest be charged? The view which I have taken is strict in holding the defendants to an exact discharge of their duty. But it does not forbid, and ought not to prevent, a recognition of their entire good faith and perfect rectitude of purpose in the entire administration. This is found by the court, and the evidence leaves no room to question their sincerity in the exercise of the discretion which they believed was committed to them, nor that they have been governed, throughout, by a desire to secure and promote the best interests of the infant children of their deceased partner and friend.

With what is termed the ungracious aspect of this prosecution, by those for whom they assumed what is very often an irksome and thankless office, we can not deal. But we may and ought to say, that no imposition, in any wise in the nature of a penalty, should be permitted.

Where the failure of a trustee in his duty is willful, or characterized by bad faith, the highest rate of interest should be imposed. But where good faith and honest mistake concur, the rate of interest rests in a discretion that permits the consideration of all the circumstances which show that substantial justice can be done to the *cestui que trust*, by allowing a less rate.

Hence, in such case, we may not close our eyes to the fact, that in a long course of years, such as are now under consideration, there are periods in which it is impracticable to realize, on investments which give the requisite assurance of safety, the highest interest allowed by law; that loans for long periods will rarely be taken, on such security, at the highest rate; that in a commercial community, like our own, fluctuations are frequent and large; and especially that, in the management of funds of considerable amount, there must necessarily be intervals when funds lie idle, seeking investment, notwithstanding all reasonable diligence on the part of the trustees.

These and like considerations have led the Court of Chan-

cery in England to charge the executor with not exceeding four per cent; where he has acted in good faith, and has not himself realized a greater profit, the legal rate of interest being five per cent; and I think there is nothing in *Ackerman v. Emott*, 4 Barbour, S. C. 628; *Dunscomb v. Dunscomb*, 1 Johns. Ch. 508; or *Clarkson v. Depeyster*, Hopk. Ch. 426, that forbids their due weight in our decision.

My conclusion on this point is, that the trustees are not justly chargeable with more than six per cent. That conviction is strengthened by the fact that the stocks of the United States, which the counsel for the plaintiff concedes would have been a proper security, do not, in the absence of the present extraordinary condition of our affairs, yield a higher rate; and it is at least doubtful whether, during many years of the continuance of this trust, these stocks could have been had without the payment of a premium, which would have reduced the income still lower.

There is no ground for withholding commissions. Even in cases of misconduct or gross negligence, it is at least doubtful whether the settled rule in this State would not require the allowance of commissions; and, where no imputation of this rests upon the trustees, their title to commissions is in no doubt. See *Vanderheyden v. Vanderheyden*, 2 Paige, 288; *Rapelje v. Norworthy's Executors*, 1 Sandf. Ch. 406; *Meacham v. Sterns*, 9 Paige, 405.

It is not very material to notice an apparently palpable error in the judgment, except to call the attention of counsel to it in the future. The account stated by the referee contains a credit to the defendants of \$128.95, paid for income tax in October, 1865; and the apparent amount to the credit of the plaintiff in that account (\$26,964.27) is subject to abatement for that payment; and nevertheless the judgment was entered for the full sum of \$26,964.27, without allowing the credit for that income tax, although the referee had credited it to the defendant, he not having made the actual deduction.

The decree herein should be modified to conform to the foregoing views, with a direction to state the account accordingly; and in other respects it should be affirmed, without costs, on this appeal.

The same principles should govern the disposition of the other two cases: *Anna Henrietta King*, respondent, v. *The Same*, appellants; and *Charlotte E. King*, executrix, et al, respondent, v. *The Same*, appellants.

I do not understand that any other questions are involved in them, which are not considered in the foregoing opinion.

All the judges concur in the result to which Judge WOODRUFF arrived.

MURRAY, J., thought it a settled principle of law, in this State, that a trustee, holding trust funds for investment for the benefit of minor children, must invest in Government or real-estate securities, and that any other investment would be a breach of duty, and the trustee would be personally liable for any loss. GROVER, DANIELS, and JAMES, J. J., concurred. HUNT, C. J., MASON, and LOTT, J. J., *contra*.

LOTT, J., was inclined to the opinion that the interest should be but five per cent, with annual rests, upon the principle suggested in *Williamson v. Williamson*, 6 Paige, 306.

DECREES AFFIRMED, with the modifications indicated in the opinion of WOODRUFF, J., without costs of appeal.

THE BOARD OF EDUCATION OF THE INCORPORATED VILLAGE
OF VAN WERT v. THE INHABITANTS OF SAID TOWN AND C.
P. EDSON AND P. DePUY.

[Decided at the December term, 1868, of the Supreme Court of Ohio, Judge JOSIAH SCOTT, delivering the opinion of the Court. Reported in 18 Ohio State, 221.]

The incorporated village of Van Wert was laid out in 1835, and the proprietors, by plat duly acknowledged and recorded, dedicated two specified lots therein "for school purposes, and on which to erect school-houses." By reason of the subsequent construction and continued operation of a railroad, and the location of a depot in connection therewith, in close proximity to these lots, they were rendered unsuitable to be used as sites for school-houses, and their use for that purpose became dangerous. A petition was filed by the Board of Education of the incorporated village, praying, for the reason aforesaid, that the Court of Common Pleas might order the lots to be sold, and the proceeds of sale to be applied to the purchase of suitable school-house sites, or

to the erection of school-houses on suitable grounds to be procured by the Board. Upon demurrer to the petition—*held*:

That the dedication was for a specific use, and conferred no power of alienation so as to extinguish the use.

That if the use created by the dedication were abandoned, or should become impossible of execution, the premises would revert to the dedicators or their representatives, and that, without their consent, they could not be divested of their contingent right of reversion by an absolute alienation.

The principle upon which a trust may, under certain circumstances, be executed *cy-pres* is not applicable to such a case.

APPEAL. Reserved in the District Court of Van Wert County. The case is sufficiently stated, in the opinion of the court.

R. C. Spears, for demurrants. *A. G. Thurman*, for plaintiffs

SCOTT, J.: This cause originated in the Court of Common Pleas of Van Wert County, in which the plaintiff, by petition filed February 12, 1866, alleges in substance:

That the original proprietors of the village of Van Wert, by a town plat duly acknowledged and recorded in May, 1835, dedicated two town lots, numbered 3 and 18 on said plat, "for school purposes and on which to erect school-houses."

That the proper authorities, shortly afterward, erected a school-house on one of said lots, and occupied the same, in conformity with the purposes of said dedication, till the year 1855, the limited population prior to that time not requiring a similar occupancy of the other lot; that the only means of access to said lots is from Jackson Street; and that in 1855 the said street was occupied by a railroad company as a part of the line of its railway; and that said company constructed a depot in close proximity to said lots, and thereby rendered them worthless as sites for school-buildings, as the noise and danger incident to the running of trains rendered their use for such purpose inconvenient and dangerous.

That the increase of population and the wants of the village had, by this time, rendered it necessary to erect additional school-buildings, and to procure other and different sites therefor, as said lots had been rendered unsuitable for the purpose, by reason of the location and use of said road and depot; and that such other sites have been accordingly purchased, and buildings erected thereon.

That, to meet the growing wants of the village, it has become necessary to procure still farther grounds for sites, and erect additional school-buildings thereon; and, under the circumstances, the plaintiff asks for authority to sell said lots (3 and 18), and apply the proceeds of sale to the purchase of sites for additional school-buildings or for the erection of such buildings.

Edson and DePuy are made parties defendant, on the ground that they claim a title to the premises adverse to the plaintiff, which they are called on to disclose.

Edson and DePuy demurred to the petition on the general ground that it does not state facts sufficient to constitute a cause of action.

The inhabitants of the village of Van Wert are made parties defendant in the title of the case, but neither the incorporated village of Van Wert nor its inhabitants have answered or demurred; nor do we find that they, or either of them, have been brought into court by service of process or otherwise.

The Court of Common Pleas sustained the demurrer and dismissed the petition; the plaintiff appealed to the District Court, in which the case was reserved for the decision of this Court.

It is claimed for the plaintiff that the title to the lots in question is vested in the plaintiff by section 3 of the act of March 13, 1850. (S. & C. 1377.) That section is as follows: "The title to all real estate and other property, belonging, for school purposes, to any city, town, village, township, or district, or to any part of the same, which is or may be organized into a single school district, in accordance with this act, or the act to which this is an amendment, shall be regarded in law as vested in the Board of Education thereof, for the support and use of the public schools therein; and said Board may dispose of, sell, and convey said real estate, or any part of the same, by deed, to be executed by the president of said Board, upon a majority vote for such sale, at any regular meeting of the electors of said district."

It does not appear that the village of Van Wert is organized into a single school district, under the acts referred to, nor does the petition state that a sale has been voted for at a regular meeting of the electors of such district. And if such organization and vote be assumed, and the beneficial ownership of the

lots by the village be regarded as absolute and unqualified, we do not see that, as against the village, the plaintiff needs any further power than is conferred by this section of the statute; and we know no authority vested in the courts of the State to grant further power, if the legislative grant be insufficient.

But we think it clear that this statute was intended to apply only to cases where the absolute ownership of the property is in the city, town, etc., which has been organized into a single school district, under the act of February 21, 1849, and that it was not intended to affect any interest of the original proprietors of towns growing out of their dedication of particular lots or lands, for specific uses. The Legislature could not thus transfer private rights of property, nor change the character of the use created by such previous dedications. *Le Clercq v. Town of Galipolis*, 7 Ohio, part 1, 217.

By the 8th section of the act of March 3, 1831, to provide for the recording of town plats (S. & C. 1484), it is provided: "That the plat or map, when recorded as required by this act, shall be deemed and considered in law, a sufficient conveyance to vest the fee simple of all such parcel or parcels of land as are therein expressed, named, or intended for public use, in the county in which the town is situated, *for the uses and purposes therein named, expressed, or intended, and for no other use or purpose whatever.*"

The town plat, in this case, was executed and recorded in 1835, and the result was that the fee simple of the lots in question was thereupon vested in the county of Van Wert, but wholly *in trust*, for the public use specified in the dedication, *and for no other use or purpose whatever.*

"If subsequent legislation has changed the trustee, the trust or use itself remains unchanged. The dedication in this case, as stated in the petition, was "for school purposes, and on which to erect school-houses." Without determining whether, under this dedication, the lots could properly be used for school purposes, other than the erection of school-houses thereon, it is enough to say that the dedication is of the *land*, and not of its value or proceeds. It confers no power of alienation discharged of the use by which the purpose of the dedication might be utterly defeated. Should the sole uses, to which the property

has been dedicated, become impossible of execution, the property would revert to the dedicators, or their representatives, *Williams v. The First Presbyterian Society of Cincinnati*, 1 Ohio St. 478 (per Thurman J.); *Le Clercq v. The Town of Gallipolis*, supra, (per Lane J.)

Is it competent for a court of equity, without the consent of the dedicators, to extinguish forever this right of reversion, by ordering a sale of the property, and assuming to execute the trust *cy-pres*, by transferring it to the proceeds of the sale? We think judicial power can not legitimately be so far extended.

Even if this could be done, the dedicators should certainly be made parties to the proceeding; otherwise their rights would be unaffected by any order of the court in the premises. The only defendants served with process in this case are Edson and DePuy, and it is not alleged in the petition, that they are the assignees of the dedicators, or in any way claim under or represent them. Still, as the prayer of the petition is only for an order directing the sale of the lots, and the application of the fund arising therefrom; and as no specific relief is asked as against Edson and DePuy, it is perhaps to be inferred that the title alleged to have been set up by them, is not adverse to or inconsistent with the right of the plaintiff to use the property pursuant to the declared purposes of the dedication; but it is adverse only to the right which the plaintiff claims to discharge the property from the specific public uses contemplated by the dedicators, and to convert it into private property by an absolute alienation. At least there is nothing in the petition to negative the idea that Edson and DePuy claim under the dedicators, and we think their general right, as defendants, to demur to the petition, can not be limited by the mere assumption that they are strangers to the dedication. And, for the reasons already indicated, we think their demurrer must be sustained, and the petition of plaintiff be dismissed. Judgment accordingly.(a)

DAY, C. J., and BRINKERHOFF, WELCH, and WHITE, J. J., concurred.

(a) See the case following, *Wensinger v. Alemany*, 40 California, 288, *contra*. In *Williams v. First Presbyterian Society of Cincinnati, et als*, 1 Ohio State, 478, it was held that a dedication by the original proprietors of a town of a parcel of ground therein, for public uses, is valid, although they held but an equitable estate in the

premises; and their trustee, holding but a naked legal title for their use, is bound to respect such dedication. Such dedication, made before any legislative act required town plats to be recorded, is valid without such record. And it is valid, although there were no grantees in *esse*, when it was made, capable of taking the fee. That property dedicated to public uses, without any provision for a forfeiture, does not revert to the dedicators upon a misuser of it. It is only when the uses become impossible of execution, that it can revert. That the right of a county or town to property thus dedicated may be barred by the statute of limitations, or lost by lapse of time; and so may a right of the dedicators to enforce a specific execution of the purposes of the dedication; and such dedicators have not, by mere operation of law, exclusive of any provision in the act of dedication, a visitatorial power. That where a trustee, with the knowledge of his *cestui que trust*, makes a conveyance apparently in derogation of the trust, and undisturbed possession is held and improvements made during a long period, namely, fifty years, by the grantee and those claiming under him, in which period no claim is asserted by the *cestui que trust*, it may be presumed that he, for a sufficient consideration, directed or acquiesced in the conveyance. That where a legal estate is granted or devised to trustees, without words of perpetuity, upon trusts of perpetual duration, there is much reason and authority for holding that the legal estate, taken by the trustees, is commensurate with the trust, and therefore a fee. But wherever the legal title goes, upon the death of the grantee or devisee, it remains charged with the trust; and even if the trustees do not take a fee, yet if the trust is created by deed, containing a covenant of general warranty, binding the grantor and his heirs forever, such deed may operate by way of estoppel, to conform to the beneficiaries of the trust, the perpetual and beneficial estate in the land. That a deed to certain persons as "Trustees of the Presbyterian Congregation of Cincinnati, and their successors forever," "for the use, benefit, and behoof of the aforesaid congregation forever," there being then but one such congregation, is not void for uncertainty as to the beneficiaries of the trust, although they were not then incorporated.

Whicker v. Hume, 7 House of Lords Cases, 124: A testator gave to trustees funds to be applied by them "according to their discretion, for the advancement and propagation of education and learning all over the world." Held, that this was a valid charitable bequest, and not void for uncertainty.

In *Hatch v. Cincinnati and Indiana Railroad Company*, 18 Ohio State, 92, it was held that where a railroad company resorted to the form of an appropriation of the body of a canal, for the purposes of a railroad, for the purpose of consummating an amicable purchase by the railroad company from the canal company, of its easement in the lands appropriated, and a railroad was thereupon constructed on the line, and in the place of the canal, it was not such an abandonment of the easement of the canal company as would work its reversion to the owner of the land in fee simple.

WENSINGER, *et als*, v. ALEMANY.

[Decided at the October term, 1870, in the Supreme Court of California, Justice WILLIAM T. WALLACE delivering the opinion. Reported in 40 California, 288.]

A court of equity has jurisdiction to decree a sale of property held in trust for charitable or religious purposes when, in its opinion, the objects of the trust would be more effectually carried out by such sale.

A decree of sale of property held in trust for religious or charitable purposes should require from the trustee a bond, with sufficient security to be approved by the court, for the proper application of the proceeds of the sale to the purposes of the trust, according to the directions of the decree, and reserving the authority of the court, upon proper showing, to require additional security, or to appoint another trustee, if circumstances make it necessary.

The costs of litigation, including reasonable fees to counsel, in a proceeding for the sale of property held in trust for religious or charitable purposes, are a proper charge on the trust fund, and should be allowed by the court.

APPEAL from the District Court of the Fourth District, city and county of San Francisco.

George Cadwallader, for appellants. *W. H. L. Barnes*, for respondent.

Action brought by Joseph S. Alemany, Roman Catholic Archbishop of San Francisco, against the defendants, members of the congregation of Roman Catholic Germans of the city of San Francisco, to obtain a decree for the sale of certain lots, and the buildings thereon, including the Church of St. Boniface, held in trust by him for the use of said congregation, and to apply the proceeds, after paying off the indebtedness of said congregation, to the purchase of another and more suitable lot and the erection thereon of a suitable church edifice and other necessary buildings, and that the lot of ground so purchased shall be conveyed to plaintiff, and shall, together with any buildings erected thereon, be held by him upon the trusts respecting the same, in all respects as the premises sought to be held have been heretofore held and enjoyed (*a*).

(*a*) The words of the deed under which the church property was held, are these: "The above described lot, and any building or buildings erected or to be erected thereon, be used and employed as a Roman Catholic Church for the German congregation of the city of San Francisco . . . exclusively forever."

Judgment was for plaintiff, in accordance with the prayer for the complaint, authorizing and directing him to sell the premises therein described for the best price that in his judgment could be obtained therefor, but for not less than \$65,000 in gold coin, and that the costs and disbursements of the plaintiff and counsel fees, not exceeding \$500, be allowed to the plaintiff out of the trust funds, and that the plaintiff pay the costs and disbursements of the defendants.

Defendants moved for a new trial, which was denied, and this appeal is taken both from the judgment and the order denying a new trial. The other facts are stated in the opinion.

WALLACE, J., delivered the opinion of the Court, CROCKETT, J. and RHODES, C. J., concurring :

The principal purpose intended by the donors was to provide "a Roman Catholic Church for the German congregation of the city of San Francisco." As a means to this end the lot on Sutter Street, near Montgomery, was selected, and at the time of the selection it was suitable, or at least not inappropriate for that purpose. Subsequent events, not then anticipated and therefore not expressly provided for by the donors, have already practically defeated the scheme of the original donation. Hotels and business-houses and places of public resort have grown up in close proximity to the property. A variety of circumstances, the results of the unforeseen growth of a populous city beyond and around the premises, have, as found by the court below, rendered this lot "unsuitable as a site for an edifice for religious worship." These circumstances have, at the same time, greatly enhanced its value in the market, and it appears that a sum can be obtained for it which will be sufficient, after paying off the indebtedness of the church, to purchase a suitable lot in the city, and erect thereon an edifice proper for the accomplishment of the original design of the donation. The court below directed, under these circumstances, a sale of the premises and a reinvestment of the proceeds of the sale in furtherance of the object of the trust. We see no error in the general scope of the decree. It can not be said to have displaced or interfered with the original trust, for that, so far as the particular premises are concerned, had already been practically defeated by the cir-

cumstances before adverted to. The decree, in its effect, re-establishes the trust as far as possible, and provides the only means by which the interest of the donors may be executed and carried into substantial effect. Under these circumstances, however, and in view of the fact that a large sum of money will come into possession of the respondent, which it will become his duty to expend pursuant to the directions of the decree, we think the court below should have directed that he give a sufficient bond to secure the fund against possible loss.

It is therefore ordered, that the cause be remanded to the court below, with instructions to modify the decree by requiring of the respondent a bond, with two sufficient sureties, to be approved by the court below, in the sum of \$140,000, conditioned for the faithful application of the proceeds of the sale according to the directions of the decree, and reserving the authority of the court, upon application of any party interested, to execute a further bond, if the insolvency of the sureties or other circumstances should require it; and its authority, if circumstances should make it necessary, to order the fund itself into the hands of another trustee of its own selection, to be applied and expended under the direction of the court.

SPRAGUE, J., expressed no opinion. Mr. Justice TEMPLE, being disqualified, did not sit in the case.

Upon petition by appellants for a modification of the judgment of this Court, WALLACE, J., rendered the following opinion, CROCKETT, J., and RHODES, C. J., concurring. It is ordered, that there be added to the directions to the court below the following words: "It is further ordered, that the costs of the litigation in the cause be paid out of the trust fund, and that the court below allow to the appellants a reasonable counsel fee, to be paid out of said trust fund."(a)

(a) See *Norman v. Norman*, 6 Bush's Ky., 496, referred to in note page 179, preceding.

WEDDERBURN v. WEDDERBURN.

[Decided in 1838, in the High Court of Chancery in England, by Lord Chancellor COTTENHAM. Reported in 4 Mylne and Craig, 41, S. C. 18 English Chancery Rep. 40.]

By articles of partnership, between three persons, it was stipulated that, in case of the death of any of them, the partnership should cease on a certain subsequent day, and the property of the partnership be then divided between the surviving partners and the executors of the deceased partner. One partner, by his will, directed all his property to be converted and invested for the benefit of his children, and appointed his copartners his executors, and died, leaving his children all infants. The two surviving copartners, having proved his will, had the property of the partnership valued, and then proceeded to continue the business under a new firm, and debited the new firm with the value of the testator's share of the partnership property, but did not otherwise execute the directions either of the articles or of the will. *Held*, that the transaction must be treated as a nullity, so far as the children's interests were concerned.

The executors of a testator, who were also his surviving partners, and had continued to employ his share of the partnership capital in trade, held answerable for a proportionate share of the profits of the trade, notwithstanding that the capital of the partnership, at the time of the testator's decease, consisted only of debts due the partnership.

Degree of weight to be attached to deeds of release executed by *cestui que trust* within a few days after their respectively coming of age, when such releases profess to proceed upon the examination of complicated accounts.

The bill stated that an account had been made out, showing that a certain sum was due to the plaintiff, and it alleged that the defendants set up that account, and the payment of the balance, as a final settlement. The bill charged the contrary, and that much more was due to the plaintiff, as would appear if certain accounts were rendered. A deed of release had, in fact, been executed by the plaintiff, at the time of the payment of the balance in question; but the bill made no mention of it. As this deed of release acknowledged the receipt of certain sums, it could not be wholly set aside; but the court was of opinion, under the circumstances of the case, that it did not deprive the plaintiff of his right to the accounts which he sought. *Seem*, that the proper form of the decree in such a case, is to declare that the plaintiff is entitled to the accounts, notwithstanding the provisions of the deed of release; but a decree which directed the accounts, without noticing the deed of release, was not considered to require alteration.

Between *cestui que trust* and trustee no lapse of time will preclude the account from the commencement of the trust, in a case in which the relation of trustee and *cestui que trust* continues—the transactions between them are not closed, and the delay of the claim is attributable to the trustee not having given to

his *cestui que trust* that information to which he was entitled, and accounted with him in such manner as he ought.

Difficulties of enforcing in chancery a *cestui que trust's* right (however clear) to participate in profits of a trade carried on in part with the trust fund.

THE facts in this case, and the terms of the decree made upon the hearing at the Rolls, appear very fully in the second volume of Keen's Reports, 722; and they are also stated by the Lord Chancellor in his judgment. The defendants appealed to the Lord Chancellor against the whole decree, except that part which directed the usual accounts of the personal estate of David Webster; and the appellants further submitted that the decree, so far as it related to David Webster's estate, was defective, inasmuch as it did not direct that, if in taking an account of that estate, and of the administration of it, the master should find any account settled, he was not to disturb or unravel the same.

Mr. *Knight Bruce*, Mr. *Kindersley*, and Mr. *Colville*, for appellants. The Solicitor-General, Mr. *Jacob*, and Mr. *Roe*, for respondents.

The Lord Chancellor COTTENHAM: Although the papers in this case are voluminous, and the questions of great importance, the facts, so far as they appear to me necessary to be considered, lie in a narrow compass, and the points to be decided are:

1. What was the effect of the arrangement of 1801?
2. What were the rights of the plaintiffs independently of that arrangement?
3. What was the effect of the several deeds executed by the plaintiffs?
4. What ought to be the effect of the time that has elapsed?
5. If the plaintiffs are entitled to what they ask, what ought to be the form of the decree?

I. As to the arrangement of 1801, the facts are simply these: The testator, David Webster, had been engaged in partnership with John Wedderburn and David Wedderburn, under a deed of 1796, for seven years from the 1st day of May, 1796, if the three should so long live, in which deed very special provision is made for settling the account with the estate of any one of the partners who might die during the continuance of the partnership. It is thereby provided, that the partnership shall be con-

sidered as continuing up to the 1st of May, after the death of any partner; but that after such death, nothing shall be done by the survivors to prejudice or affect the estate of the deceased, or his interest in the joint stock; that within three months from the 1st of May, after the death, the account between the survivors and the estate of the deceased partner shall be made out, so as to show the share and interest of the deceased, and shall be signed by his executors and the surviving partners; that as soon as conveniently may be after such settlement, all the debts due by the firm shall be paid, and that thereupon a partition and delivery shall be made of all residue of the joint property, including a partition of all debts due to the firm; and the representatives of the deceased partner are to have the right to use the names of the survivors to compel payment of the debts assigned to them.

It appears that John Wedderburn and David Webster, who had carried on the business before David Wedderburn was admitted into partnership with them, were possessed of certain shares in ships, and it has been assumed that such shares constituted part of the joint stock and partnership property; but I do not find that to have been the case, and, on the contrary, I think it appears that these shares were the separate property of each partner, although, no doubt, the possession of such shares was considered as beneficial to the joint trade; and the deed therefore provided that David Wedderburn should purchase one-sixth share in the ships from John Wedderburn and David Webster, and that, in the event of the death of either of them during the copartnership, he should purchase from the representatives of the deceased such further shares in the ships and other property, as should be equal to his then share in the continuing business; but those shares were, as I collect, registered in the names of the individual partners, and therefore could not, according to the case of *ex parte Yallop*, 15 Ves. 60, be considered as part of the partnership estate, and I do not find that there was any intention that they should be so considered.

David Webster died in March, 1801, and appointed his wife, and his two partners, John Wedderburn and David Wedderburn, executors of his will; but the two latter alone proved. By this will, the children of David Webster were entitled to certain

interests in his property; but I do not find that it contained any directions as to the mode of settling the account with the surviving partners. It however directed his executors to convert his *shares* of ships and other property into money as soon as might be after his decease, and to invest the proceeds for the benefit of his family. Some stress was laid, in argument, upon the fact of the testator having appointed his partners his executors; and no doubt that appointment proves the testator's confidence in them, and in the prosperity of the business in which he had been engaged; but that the testator should have been desirous of conferring upon them that office, is much less matter of surprise than that they should have accepted it, assuming, what I see no reason to doubt, that they intended to act with the most perfect honor and integrity toward the family of their deceased partner. Had the representatives of the testator not been his surviving partners, their duty would have been to have followed, as closely as possible, the provisions of the deed and the directions of the will; and any settlement they might have come to with the surviving partners, would have been binding; but the union of the two characters in the same person rendered any binding settlement extremely difficult. A strict adherence to the provisions of the deed could hardly have been so conducted as to have excluded future investigation and inquiry; but they did not attempt to observe those provisions, or to follow the directions of the will, but assumed to themselves the power and right of selling as executors, and purchasing as partners, the testator's shares in the ships, and in such of the debts and other property belonging to the firm as they were desirous of becoming possessed of. But that was not all; for instead of setting apart and investing the sum assumed as the purchase-money, as directed by the will, they kept it as a debt due from the new firm, exposing the property of the infants to all the risks of trade. I am clearly of opinion that these transactions of 1801 had no effect whatever in altering the position of the testator's property and interest, and that the rights of his children are to be considered precisely as they would have been if no such transaction had taken place. If any authority were required for this purpose, the language of Lord ELDON, in *Cook v. Collingridge*, Jacob, 607 (see p. 621), as quoted by the Master

of the Rolls (see 2 Keen, 731), would be amply sufficient. Upon the first point, therefore, I entirely concur with the judgment of the Master of the Rolls.

II. How then does this part of the case stand, treating this attempted settlement as of no effect? John Wedderburn and David Wedderburn, as surviving partners, instead of separating the property of their deceased partner from the property employed in carrying on the business, continue to employ it in their own business. This, according to *Brown v. De Tastet*, Jac. 284; *Crawshay v. Collins*, 15 Ves. 218; 1 J. & W. 267; 2 Russ. 325; *Featherstonhaugh v. Fenwick*, 17 Ves. 298; *Cook v. Collingridge*, Jac. 607, and other cases, would have subjected them to an account for the profits made thereby; but, as personal representatives, they, instead of realizing their testator's property, and investing it according to the directions of the will, employ it in their trade and business. This subjects them, as executors, to account for the profits thereby made, as in *Docker v. Somes*, 2 Mylne & Keen, 655. In each of the two characters they held, they are subject to the account decreed against them. Upon this second point, therefore, there is not, I think, any doubt of the propriety of the Master of the Rolls' decree. It was, indeed, contended that there was no employment of the testator's capital, the capital of the trade consisting only of debts due; but why were they not called in, but for the interest of the survivors, and what enabled them to give the credit but the capital of the testator?

III. The effect of the deeds executed by the children is next to be considered, and first in date that executed in 1809, by the plaintiff, Sir James Webster Wedderburn. It is, in the first place, to be observed that the appeal is against so much of the decree only as directs accounts to be taken of the transactions of the several partnerships, except that it complains that the decree does not direct that if, in taking the accounts of and relating to the personal estate of the testator and the administration thereof, the master should find any account stated, he was not to disturb or unravel the same. The direction thus suggested is not, as I conceive, adapted to the facts of this case, in which an account alleged to be a settled account, that is, the account indorsed upon the deed, is put in issue and proved in

the cause. It is in such cases for the court to direct what shall be the effect of such an account, and not to leave that question to the master. Except as to this point, the appeal would appear to be the appeal of the partners in the successive firms, and to complain only of the decree so far as it directed an account of the profits; but the deed of 1809 is not between Sir James Wedderburn and any other as partner in the business, but between him and the late John Wedderburn, as executor of James Webster, whose estate is not in question upon this appeal, and as one of the executors of David Webster, the testator; and that deed takes no notice of any claim the plaintiff might have against the continuing or succeeding partners in the business, but deals only with the liability of John Wedderburn as personal representative; nor does it profess to state or settle any account of the personal estate of David Webster, but reciting that the residue of such personal estate, after payment of debts, was considered or supposed to amount to 75,068*l.*, upon the account made up and indorsed on the 31st of May, 1809; and that deducting what had been advanced to Sir James Wedderburn, the balance apparently due to him from the estate of the testator was 11,399*l.*, and reciting that a considerable part of the estate of the testator consisted of his share of a debt due from the estate of James Webster, of which John Wedderburn was executor and beneficial owner. John Wedderburn undertakes to pay this apparent balance by installments, in consideration of which the plaintiff, Sir James Wedderburn, declares himself satisfied with the disclosure thus far made, and accounts thus far given, of the personal estate of David Webster, and of the said principal sum or balance of 11,399*l.*, being justly due to him from the same estate under the will of David Webster; and that he, John Wedderburn, making the payments as agreed, he, the plaintiff, would not require payment from him or from the other executor of David Webster, of the sums so agreed to be paid to him; but it is expressly provided that the deed and the agreement therein contained shall be understood as applying only to the account and state of things on the 1st of May, 1809, as then accounted for, and as not precluding him from claiming any further part, share, or personal estate, or sum of money,

under the will of David Webster, not as yet received, fallen in, or accounted for.

The accounts scheduled are of debts due to and from the firm of Webster, Wedderburn & Co., on the 1st of May, 1801, and speculative calculations as to the amount of Sir James Wedderburn's share in his father's property upon various suppositions. So far as this deed is relied upon as excluding an account of the profits of the trade, or which have arisen from the use of the testator's estate, it would be a sufficient answer that the profits so claimed consist of sums of money not accounted for in the account scheduled to that deed. But in fact that deed is not any settlement of any account, but only provides the means of paying an estimated and speculative balance in a manner most advantageous to the accounting party. That deed, therefore, can not, I think, operate as any bar to the account decreed.

The next deed is of the 29th of August, 1812, executed by one of the daughters, Miss Anne Webster. It is in most respects the same as the other, but it contains additional proof that there was no intention of settling any general account of the personal estate, and certainly not of the profits of the trade, because it does contain a release as to a certain sum invested and as to sums extended for the benefit of Miss Anne Webster, but the release is expressly confined to those two objects. There is also indorsed upon this deed an account of receipts and payments on account of the personal estate from 1809 to 1812, and that account may be *prima facie* evidence of the items it contained, but it can not be treated as a binding account, the deed itself providing that it should not preclude any claim in respect of moneys or personal estate not accounted for.

The next deed is of the year 1813, and executed by the daughter Mary, afterward Mrs. Hawkins. It is in all respects similar to the last, and subject, therefore, to the same observations.

The last, and, in point of form, the most important of these deeds, is that executed by the plaintiff, Charles Wedderburn Webster, dated the 13th of September, 1820. It purports to release John Wedderburn and Sir David Wedderburn from all demands on account of the personal estate of the testator, David Webster, in the most general terms; and it recites that there

had been submitted to him (Charles W. Webster) accounts of the said personal estate, and of all the receipts and payments respecting his expectant share thereof, all which he had examined and approved, and found, upon such examination, that his share of the testator's estate consisted of 29,160*l.* three per cents, and certain other sums of money specified; and it recites that he (Charles W. Webster) had attained twenty-one on the 10th of that month; and that this investigation of the accounts had taken place since. No accounts are attached to the deed, or proved in the cause, as being the accounts referred to. The Master of the Rolls refers to an account marked No. 11 D., which he supposes to have been the account referred to, but I do not find any evidence of that fact. In the absence of all proof to the contrary, I must assume that the mode adopted upon all the former occasions of stating the account was followed upon this; and that the calculation proceeded upon the statement made in 1809; and if so, it is impossible that such a statement could bind the infant. If there had been any such investigation of the accounts as could have made the release binding, the defendants might have proved it. But though the transaction is impeached, they do nothing but produce the instrument itself, which, upon the face of it, purports to be a release, on the third day after the infant attained twenty-one, of the result of an account extremely complicated in its nature, and of the transactions of very many years (as it must have included the unsettled partnership accounts before the death of the testator in 1801), upon the alleged investigation by the infant within two days, and of which account no evidence is given. It can not be seriously questioned whether the infant can be bound by such an instrument under such evidence (*a*). It is, indeed, incon-

(*a*) "I take it to be settled, that where a release is obtained upon a ward's freshly arriving of age, the whole burthen is cast upon the guardian of proving every thing essential to make the release a valid discharge; and nothing is more essential than a full, entire, and minute account. The doctrine of a court of equity upon this subject is an instance of the wise flexibility of its rules, for the preservation of rights. In a court of law, the moment of emancipation from the legal privilege, is the moment of absolute power and of unlimited capacity. This Court extends its watchfulness further, and requires that a discharge to the guardian shall not be precipitated; that ample time shall be allowed for consultation and inquiry; that there shall be a full exhibition of the estate, and of its administration; and it requires that a guardian who settles his account in secret,

sistent with the whole of the case now made by the defendants, that any such accounts should have been rendered as could alone make any settlement binding, the defendants having always disputed the right of the plaintiffs to any investigation of the subsequent transactions of the trade.

It was then argued that this release by Charles Wedderburn Webster, however liable to be impeached, is binding till set aside, and that the bill does not pray any such relief. If this objection should prevail, it would affect the share of Charles only; and if the court had found itself compelled to yield to the objection, it would not have permitted the real justice of the case to be defeated, but would have enabled Charles Wedderburn Webster to renew his demand in another shape; but although there is some difficulty as to the form in which the case has been brought forward, I do not think that the objection ought to prevail against even the claim of Charles. The bill takes no notice of the deed, but it states that an account was made out of Charles's share, showing that 13,085*l.* was the sum due to him, and charges that much more was due; and it then states that the defendant set up the settlement of the account and payment of the balance upon Charles's attaining twenty-one, and charges the contrary, and that he and the other children are entitled to other large sums, as would appear if accounts were rendered of the profits. The defendants, by their answer, state the deed, but dispute the claim to an account of the profits to which the deed does not profess to relate. I am of opinion that, under these circumstances, the deed and the settlement which it is alleged to include, being in issue, and the latter impeached, it was competent for the court to decree the relief it found the plaintiff to be entitled to, being of opinion that the title to such relief was not precluded by that deed. The decree might, in terms, have decreed the account, notwithstanding the provisions of that deed;

shall be prepared to prove that he has fully complied with those requisitions, unless he can shelter himself under a positive ratification—a deliberate, intelligent, voluntary acquiescence; or such a flow of time as will induce the court to refuse its interposition.” HOFFMAN, Ass't V. C., *Fish v. Miller*, 1 Hoff. Ch. Rep. 270. Whether it be the case of a ward, as between him and his guardian, or any other person who has just attained years of maturity, and those who have had the management of his estate, as trustees, or however otherwise, *mutato nomine*, the principle is still the same—*Note to the report in 18 Eng. Ch. Reports.*

and this would perhaps have been the most correct form, because the deed could not have been wholly set aside without injustice to the defendants, as it will still be evidence against Charles Wedderburn Webster of the payments therein acknowledged to have been received, though treated as ineffectual for the purpose of precluding the account; and, looking at the pleadings and the decree together, I think that this is, in effect, the result, and that no alteration in the decree upon that point is necessary. I therefore agree with the Master of the Rolls upon this point also.

IV. If, then, the plaintiffs were originally entitled to the account prayed, and if they had not in fact released such title, are they precluded from asserting it by the time that has elapsed?

The case is one of trust. No presumption of payment or satisfaction or waiver can arise, because the title is in dispute at this moment, and the facts upon which the plaintiffs' title depends were not made known to them, and although the commencement of the transaction is of an early date, and one of the plaintiffs attained twenty-one in 1809, and the youngest in 1820, yet the transactions have never terminated or the accounts been finally closed. This appears from all the accounts rendered, all proceeding upon calculations of uncertain dependencies. No case has, under such circumstances, considered time as precluding the account from the commencement; namely, when the situation of trustee and *cestui que trust* has continued, the transactions between them not closed, and the delay of the claim attributable to the trustee not having given that information to his *cestui que trust* to which he was entitled, and accounted with him in such a manner as the court is of opinion he ought to have done. This is not the case of an attempt to raise a constructive trust upon transactions closed many years before, but of a direct trust, of which the transactions are not closed.

In *Beaumont v. Boulton*, 5 Ves. 485, an account was directed in 1800, which would commence in 1760. In *Townsend v. Townsend*, 1 Cox, 28 (see page 34); in *Beckford v. Wade*, 17 Ves. 87 (see page 97); and *Gregory v. Gregory*, Sir G. Coop. 201, this distinction is taken; and in *Chalmer v. Bradley*, 1 Jac. & W. 51 (see pp. 67 and 69), Sir THOMAS PLUMER not only recognized it, but, forty-five years after the testator's death, directed inquiries, with the view, if they should prove favor-

able to the claim of the *cestui que trust*, to afford him some relief. In this case the same necessity for previous inquiry does not exist.

V. The form of the decree only remains to be considered, and upon this point I have felt some difficulty, arising principally from the impression I have that the testator's shares in the ships must be considered as part of his private property, and not as part of the joint partnership stock, and the doubt, therefore, whether any direction in the decree would meet this part of the case. The Master of the Rolls seems to have thought that the purchase of these shares by the executors was not effectually impeached by the bill; and, certainly, if it shall appear to be for the interest of the plaintiffs to take the amount of the valuation of those shares instead of the shares themselves, the defendants, the executors, can not decline so to account; but I do not think that the present is the stage of the cause in which that is to be determined, and I think that the decree, as it stands, will produce all such information as may be necessary to dispose of this question upon further directions, for it directs the master to take the usual accounts of the personal estate, and he is to be at liberty to state any circumstances specially as he may think fit. The report, therefore, will no doubt bring forward all the necessary information; and as the plaintiffs have not complained of the decree, there might be some difficulty in altering this part of it.

As to the parts of the decree which are subject of the appeal, I think that they are well calculated to do justice between the parties. The account of partnership transactions up to May, 1801, is quite of course, supposing no settlement of that account to be binding upon the plaintiffs; and, as the whole case proceeds upon the assumption that the subsequent trade was carried on in part with the testator's capital, which gives to the plaintiffs a right to participate in the profits of it, if it shall appear to be their interest to claim it, the inquiry directed as to the profits made is, I think, a necessary preliminary to any decree, adjudicating in what manner and to what extent the participation of the plaintiffs in such profits ought to be provided for; and the amount of capital employed in such trade is a necessary part of such inquiry. I consider all these directions and

inquiries as preliminary steps only to the final adjudication upon the rights of the parties, and I think that the plaintiffs have made out their title to such inquiries.

I have had many occasions to consider, and have frequently expressed my sense of the difficulties which the Court has to encounter in administering equity according to its acknowledged principles in cases of this description. So many decisions have established the right of parties to participate in the profits of trade carried on under circumstances similar to the present, that no question can be raised as to the duty of the Court in decreeing such relief when a proper case arises for it; but it is obvious that very great difficulties exist in enforcing this right. Great expense, great delay, and great hardship upon the defendants frequently attend the prosecution of decrees for this purpose, and the apparent benefit decreed to the plaintiff is frequently much diminished, if not lost, in the attempt to enforce it.

This case again came before the Court, but upon a totally different point, 2 Beavan, 208.

KEYSER v. MITCHELL, et als, GARNISHEES.

[*Decided in the Supreme Court of Pennsylvania, February 10, 1871, before THOMPSON, C. J., SHARSWOOD and WILLIAMS, J. J. READ, J., at Nisi Prius. Reported in 67 Pennsylvania State (17 P. F. Smith), 473.*]

A testator devised to trustees to collect, etc., rents and income, and "pay said income, etc., or so much as the trustees may think proper, etc., under all the circumstances of the case, for the support and maintenance of my son Charles during his life, with the intent and purpose that the said trustees may either pay the said income, or such portion thereof as they may think proper, into the hands of my said son, or disburse the same in such way as to the said trustees may seem best for his comfortable support and maintenance, such payments and disbursements to be at all times at the sole and absolute discretion of the said trustees." *Held*, that the income was not liable to attachment under a judgment against the son.

The income was payable to the son at the discretion of the trustees. Until the discretion was exercised, the son had nothing.

In such case, chancery will not interfere to control the trustees' discretion. To subject the income to an execution would end the trustees' discretion and defeat the testator's intent. This form of guarding the trust and the income from the prodigality of the son is as effectual as an express exclusion of the creditors by the will. *Girard Life Insurance and Trust Company v. Chambers*, 10 Wright, 485, distinguished.

ERROR TO THE DISTRICT COURT OF PHILADELPHIA.

THIS was an attachment execution, issued October 1, 1869, by Edmund Keyser, against Charles Nicholas, defendant, and Thomas Mitchell and John C. Mitchell, and George P. Russell and David C. Landis, trading as Russell & Landis, garnishees. There was no service on the defendant or on John C. Mitchell, one of the garnishees.

L. Hirst and *R. C. M. Murtrie*, for plaintiffs in error. *F. Mitchel*, for defendants in error.

THOMPSON, C. J., delivered the opinion of the Court: The question in this case is, whether the income of the trust created for the benefit of Charles Nicholas, the defendant, by the will of his mother, was attachable in the hands of his trustee for debts contracted by him without the consent of the trustee? We have but part of the will of the testator on our paper-books, and we must presume it is the material portion of it in the case, otherwise the whole would have been given by the defendants in error.

The will is dated the 21st of December, 1854, with a codicil dated the 18th of December, 1866, merely changing the trustees. After designating the trustee and describing the property intended to be put in trust, the will reads: "To hold upon trust, to collect and receive, the rents and income accruing from the moiety of the said premises, and after deducting thereout all taxes and charges, to pay the said rents and income, or so much thereof as the trustee may think proper and expedient under all the circumstances of the case, to, and for the support and maintenance of my son Charles, during the term of his natural life, with the intent and purpose that the said trustee may either pay the said income, or such portion thereof as he may think proper, into the hands of my said son, or disburse the same in such way as to the trustee may seem best for his comfortable maintenance, such payments and disbursements *to be at all times at the sole and absolute discretion of the said trustee.*" The next item of the will (the seventh) provides for a contingent disposition of the *corpus* of the property, also at the discretion of the trustee.

Because this will contains no prohibition of liability of the

income to the debts of the *cestui que trust*, it is claimed, on the authority of the *Girard Life Insurance, Annuity and Trust Co. v. Chambers*, 10 Wright, 485, that it is subject to the attachment execution. I need not stop to discuss that case and distinguish it from this, for in it there was an express direction to the trustees to pay over absolutely to the *cestui que trust*, or to his order, the income of the trust property, quarterly, without the exercise of the least discretion on the subject by them. The income was therefore held to be his own absolutely, and he could invoke the aid of a chancellor to compel payment by the trustee to him of the amount, quarterly, as provided for. So might an assignee or creditor of the *cestui que trust* have done on the same principle. But here nothing is given to the *cestui que trust*, excepting at the discretion of the trustee. It was no doubt intended by the testator that a comfortable maintenance should be provided from the trust estate for her son; but that was to be both in amount and mode, "at the sole and absolute discretion of the trustee." This is an express condition of the trust, and until that discretion has been exercised, the *cestui que trust* has nothing, Hill on Trustees, 494-5. In such case, chancery will not interfere to control the trustee's discretion, Id. 495. To subject the income to execution at the suit of a creditor, would end all discretion of the trustee over the income, and, in effect, utterly defeat the intent of the testator in creating it. We can not but regard this form of trust to be as effectual in guarding a trust and its income against the prodigality of its beneficiary as would be a positive exclusion of creditors in the will of the donor. Where the amount results from the discretion of the trustee, and that discretion is personal, no sum, *eo nomine*, exists to be attached. It only belongs to the *cestui que trust* when it is paid, or in some other way made over, or set apart to him. We think, therefore, the attachment in this case against the trustee was entirely inoperative to bind any interest of the defendant in the trust estate, and the judgment must be affirmed. Judgment affirmed.

BARCLAY, *et al*, v. LEWIS.

[Decided in the Supreme Court of Pennsylvania, January 11, 1871, before THOMPSON, C. J., READ, AGNEW, and WILLIAMS, J. J. SHARSWOOD, J., at Nisi Prius. Reported in 67 Pennsylvania State (17 P. F. Smith), 316.]

A testator gave all his estate to trustees to invest the proceeds at their discretion; out of the income to pay annuities specified, to each of his sons during their lives; the balance of the income for the use of his wife and daughter for their lives, as the wife might wish; any of the income not so used, to be invested by the trustees, permitting the wife to use part of the income for the sons; "the fund after having been (so) administered, to be held by the trustees, after the death of the wife, for the benefit of the daughter, the income to be applied to her use during her life." After the death of the wife and daughter, "my estate to be held in trust for the benefit of the children of my sons and daughter, should they have any, and until said children shall be twenty-one years of age, and then be equally divided among said children." *Held*, 1. That the trust remained during the lives of his sons as well as of his wife and daughter; 2. That the children of the sons and daughter took by purchase and not by limitation; 3. That the children's title to the fund vested at their birth; 4. That birth was not a contingency too remote to be unlawful.

The daughter died unmarried and without issue, and the mother also died, the sons surviving, neither of whom had then any child; one was afterward born. *Held*, that the fund did not vest in the sons.

The rule that a remainder requires a particular estate, does not apply to trusts. *Per HARE, P. J.*

In order to bind a trust by a decree, notwithstanding there be many limitations, it is sufficient to bring the trustee before the court, and him in whom the first remainder is vested; and all that may come after, although not *in esse*, will be bound, *Id.*

ERROR TO THE DISTRICT COURT OF PHILADELPHIA.

IN the court below this was an amicable action of debt, and case stated, in which Herman B. Barclay and James C. Barclay were plaintiffs and S. Weir Lewis was defendant. The facts agreed in the case stated are as follows, viz.:

"John L. Barclay died in the year 1860, seized in his demesne as of fee of and in an undivided moiety of a messuage and lot of ground, situate on the east side of Third Street, etc., containing, etc., having first made and published his will, bearing date the 12th day of April, A. D. 1860, duly proved and registered in Fayette county, Kentucky. The said decedent left him surviving his widow, Lucy M. Barclay, a daughter,

Fanny B. Barclay, and two sons, Herman B. Barclay and James C. Barclay, the plaintiffs in this suit. In the year 1860 the said widow and daughter both died. The daughter died unmarried and intestate, and the plaintiffs are the heirs at law as well of their said father as of their said mother and sister. At the time of the decease of the survivor of them, the said mother and sister of plaintiffs, there was no child born of said sons or daughter of testator. Since that time the plaintiff, H. B. Barclay, has married and had a child born, who is now living.

G. T. Bispham and Cadwallader Biddle, for plaintiffs in error.
C. S. Pancoast, for defendant in error.

AGNEW, J., delivered the opinion of the Court, February 9th, 1871: The primary rule in the interpretation of wills is to determine the true intention of the testator, and, if lawful, to give it effect. If this great canon of interpretation be observed, there will be little difficulty in applying to a will the law which governs the creation and transmission of estates. We shall then be less embarrassed by the artificial and difficult rule relating to contingent remainders, executory devises, and trusts. It can not be doubted that John L. Barclay created a trust to be managed by the trustees named in his will, during the lives of his wife, two sons, and daughter. He gave his trustees, for this purpose, large powers to sell, lend on mortgage, or otherwise to invest, and pay over the income of his estate in certain proportions to his wife, daughter, and sons. The direction to the trustees to pay annuities of \$500 and \$600 to his sons, is expressly for and during life. He says that out of the income of the before-directed investment, his trustees shall pay to each, annually, the said sums. The "before-directed investment" is, "shall invest all the proceeds of my estate, not hereinbefore provided for the payment of my debts," etc. It is clear, therefore, that the testator intended that the trust, which was by its nature and terms an active one, should remain during the lives of his sons as well as of his wife and daughter, for as to all he provided only for the payment of income, while all of his estate was to be invested. It was in terms "the balance of the income of my (his) estate after the annual payment" of the \$500 and \$600 to his sons, which he directed to be paid to his wife and daughter: And it

was the income only which his daughter was to receive after the death of his wife, for and during her natural life. As he could not know which of these objects of the payment of income would die first, while all of his estate was to be invested, it is evident he intended an active management of the trust to invest, preserve, and pay over the income, to exist so long as any of the objects should survive. Then we come to the 13th item, providing for the contingency of the deaths of his wife and daughter: "13th. I direct that after the death of my wife and my daughter Fanny, my estate shall be held in trust for the benefit of the children of my sons and daughter, should they have any, and until said children shall be twenty-one years of age, and then equally divided among said children." The children here take not by limitation, or *per stirpes*, but as purchasers in their own right, their title vesting at birth, but deferred in the time of enjoyment until their arrival at full age. It is obvious that the trust and the investment as income must necessarily survive the death of the wife and daughter (leaving the sons surviving), in order to pay the annual income of \$500 and \$600 to the sons, and preserve the remainder for the children born or to be born. The legacy to the children was not to accrue at one fixed and independent period, or upon any contingency or condition other than birth, which would prevent it from vesting at birth, or opening to receive after-born children. Birth was a contingency neither impossible nor too remote, and was therefore not unlawful. There is no reason then why the intent of the testator to provide absolutely for the children of his sons and daughter in equal proportions when arriving into life, should be set aside in favor of the sons to whom he clearly intended to give the annuities of \$500 and \$600 during their lives, and nothing more. It is impossible to deny the intention of the testator to create a continuing active trust, to remain during the lives of his sons, and preserve the estate to their children in their own right. There being nothing too remote, contingent, or unlawful in this provision, it is, therefore, not to be set aside by any artificial or technical rules. The law will support it, call it by one name or another. There is abundant authority for this to be found in the opinion of the learned judge, and in the citations of the defendant in error. Judgment is therefore affirmed.

SEICHRIST'S APPEAL.

[*Decided in the Supreme Court of Pennsylvania, October 21, 1870, before THOMPSON, C. J., READ, AGNEW, SHARSWOOD, and WILLIAMS, J. J. Reported in 66 Pennsylvania State (16 P. F. Smith), 237.*]

Z bought a lot of M by articles, took possession, and made improvements. Being unable to make the payments, he sold part to S by parol, the division line being fixed by them. M, with the consent of Z, made the deed for the whole to S, he agreeing with Z to hold the other part in trust for Z, and convey to him on his paying his share of the purchase-money. Z continued in possession of his part according to a line accurately located, and made improvements. S refused to convey. *Held*, that he held in trust for Z, and could be compelled to convey; and also, that the case was not within the fourth section of the act of April 22, 1856.

Held, also, that while the act of 1856 destroys all parol trusts by contract, this trust arose by implication and construction of law, and is within the proviso of the fourth section.

A trust arising from the fraud of the holder of the title is one by operation of law; and where one procures a title which he could not have obtained except by a confidence reposed in him, and abuses the confidence, he becomes a trustee *ex maleficio*.

APPEAL from the Court of Common Pleas of Erie County, in equity. The decision in the Common Pleas was for the plaintiff, Zirkenbach, from which Seichrist appealed to the Supreme Court.

C. B. Curtis, for appellant. J. H. Walker, for appellee.

The opinion of the Court was delivered January 3d, 1871, by AGNEW, J.: The facts of this case, we think, are clearly proved. Zirkenbach had a contract with Elihu Marvin for the purchase of three acres of land, on which he had made a small payment in work, and was in actual possession under his contract, having built a house and made some minor improvements. Being unable to pay the purchase-money, he agreed with Seichrist to sell him the northern part by a line to be run in continuation of the line of an adjoining lot owned by Seichrist, to the old French road, provided Seichrist would pay off the balance of the purchase-money to Marvin. Marvin, being applied to, declined to make two deeds, but suggested that Seichrist, on paying the balance of the purchase-money to him, could take the deed for

the three acres, and afterward convey to Zirkenbach his part when he should pay for it. This was accordingly done, and in a few days a fence was put up by Seichrist on the line between him and Zirkenbach, Seichrist, at the time, stating it to be the division fence between them. Afterward, Seichrist procured the line to be traced by two surveyors for the purpose of making an accurate survey of this parcel, in order to convey his part to Zirkenbach. For a while Seichrist did not deny his obligation to convey to Zirkenbach, but finally, on the latter tendering him his money, or as much as Zirkenbach thought was coming, and demanding a deed, Seichrist denied the bargain and refused to convey. In the mean time, Zirkenbach had remained in possession, and had built a small stable or barn. The court below held that a trust arose out of these facts, and decreed in favor of Zirkenbach.

The argument in this Court is founded upon the 4th section of the Statute of Frauds of the 22d of April, 1856, which requires all declarations or creations of trusts of any lands, tenements, or hereditaments, to be manifested by writing, signed by the party holding the title thereof. If nothing more existed in the case than a mere bargain between the parties that Seichrist should take a title for the land from Marvin, and afterward convey to Zirkenbach on payment of the proportionate share of the purchase-money, the argument would be irresistible. Undoubtedly the act of 1856 cuts up by the root all parol trusts by bargain or contract. It is intended to prevent frauds in relation to the title of real estate, by requiring the evidence of it to be witnessed by a writing. But we are of opinion that this case falls within the proviso to the 4th section of the act of 1856, that where any conveyance shall be made of any lands or tenements by which a trust or confidence shall arise by implication or construction of law, such trust or confidence shall be of like force and effect as if the act had not been passed. Among the trusts thus resulting from the operation of law are those arising from the fraud of the party who has the title. Although no one can be compelled to part with his own title by force of a mere verbal bargain, yet when he procures a title from another which he could not have obtained except by a confidence reposed in him, the case is different. Here, if he abuses the confidence so

reposed, he is converted into a trustee *ex maleficio*. The statute which was intended to prevent frauds turns against him as the perpetrator of a fraud. It is not, therefore, the fact that the bargain by which he was enabled to obtain the title is verbal, which governs the case, but the fact that he procured the title to be made to him in confidence, the breach of which is fraudulent and in bad faith. Clearly such is the case before us. Zirkenbach was the equitable owner, and controlled the title to the whole three acres. Marvin could not sell it to Seichrist, nor could he reclaim the property without a legal proceeding to dispossess Zirkenbach, and rescind the contract. When Seichrist, therefore, took the title from Marvin, he did so only by the consent of Zirkenbach, who gave it in confidence, relying on the faith of Seichrist that he would hold a certain part of the land in trust for him. Thus Seichrist took in confidence that which he could not retain without bad faith and fraud. Clearly, had Zirkenbach known, or had Seichrist indicated, that he would hold the title to himself, the former never would have permitted or given the latter an opportunity of obtaining it. If Seichrist intended to retain the land, and did not say so to Zirkenbach, it was as clearly a fraud, and he is converted into a trustee *ex maleficio*.

Without a further discussion of the case, the conclusion we have come to is fully supported by *Beagle v. Wentz*, 5 P. F. Smith, and the authorities therein cited on the 374th page. To which may be added *Hoge v. Hoge*, 1 Watts, 163, and the more recent case of *Lingenfelter v. Richey*, 8 P. F. Smith, 485.

The case being one of trust *ex maleficio*, answers the argument as to uncertainty alleged in relation to the price of the one acre and thirty-nine perches retained by Zirkenbach. Had the case depended on a parol sale, and the element in it of price had been left uncertain, the argument would have had great force. But where the defendant has obtained a title in confidence, and retains it by fraud, the argument has not the same weight. We think, however, that on the evidence there is not much difficulty in arriving at the true sum to be paid by Zirkenbach. It was evidently at the rate of \$216 per acre, which is borne out by the testimony of Charles Seichrist, who testifies that his father and Zirkenbach, in August, 1867, made the sum

then due on Zirkenbach's part (one acre and thirty-nine perches), \$315. This would be at the rate of \$216 per acre, and interest added from May 5th, 1864. To this we think the court below ought to have added the \$30 agreed to be paid by Zirkenbach to Seichrist for his trouble, and the expense of the surveyors; and thus far the decree should be modified. The decree of the Court of Common Pleas is therefore affirmed, adding to the sum decreed to be paid by the plaintiff the further sum of \$30, with interest from the time of the decree; and the appellant is ordered to pay all costs, including those of this appeal (a).

(a) In *Warner v. Blakeman*, 41 New York (4 Keyes), 487, it was held by the New York Court of Appeals, Judge WOODRUFF delivering the opinion of the court, that "it is the just and proper pride of our matured system of equity jurisprudence, that fraud vitiates every transaction; and however men may surround it with forms, solemn instruments, proceedings conforming to all the details required in the laws, or even by the formal judgment of the courts, a court of equity will disregard them all, if necessary, that justice and equity may prevail." That a mortgage, in fact paid and satisfied, though without satisfaction formally acknowledged, is merely waste paper, and the power of sale contained therein is at an end, in so far that it can not thereafter, by transfer to a third party having knowledge of the facts, be revived and made effectual to destroy or to impair the subsisting lien of a judgment-creditor upon the lands conveyed by such mortgage; and as between a judgment-creditor and the fraudulent grantee of a conveyance interposed to cut off the lien of a judgment upon the lands conveyed, the lien of the creditor can not be extinguished nor impaired. The appropriate form of remedy for the judgment-creditor, where under a fraudulent foreclosure, sale, and conveyance, a legal title has been interposed, paramount under the forms of law, to his lien, is by an action to set aside such fraudulent conveyance. But where the intervening rights of subsequent *bona fide* purchasers renders such a decree inappropriate, as being in disregard of their title, innocently acquired, derived through the forms of law, and having the sanction of the courts in its support, it by no means follows that the plaintiff is remediless, and that the fraudulent conveyancer is thus to be left to profit by his wrong. And in such case, relief may be properly afforded through the appointment of a receiver, to whom the fraudulent conveyancer shall account for all moneys received from sales to *bona fide* purchasers; to whom he shall assign any mortgages taken for part of the purchase-money of such sales; and to whom he shall convey any of such lands still unconveyed, subject to any contracts to convey, or otherwise; and to such receiver the *bona fide* mortgagors shall also account for the balance remaining unpaid on such mortgages, and parties holding the defendant's contracts to convey, shall likewise account to such receiver for the balance due on such contracts, and will on the payment thereof, be entitled to receive deeds of conveyance. In effect, the FRAUDULENT CONVEYANCER IS THUS MADE A TRUSTEE OF THE JUDGMENT-CREDITOR, and is required to account to him, through his agent, the receiver, in that capacity."

MATTHIAS KLOPP v. GEORGE A. MOORE *et al.*

[Decided at the January term, 1870, in the Supreme Court of Kansas, Justice JACOB SAFFORD delivering the opinion. Reported in 6 Webb's Kansas, 27.]

Title to property of religious corporations, by the Constitution of Kansas, vests in the trustees; and trustees of such corporations can not bind the corporation by their covenant, unless duly authorized.

When the trustees of a church, organized under the laws of this State, in making a deed of real estate, covenant under their hands and seals to warrant and defend the quiet and peaceable possession of the same, without showing in any manner that authority had been given them by the corporation for the making of such covenant, and without expressly excluding personal liability: *Held*, that they are personally liable on such covenant.

ACTION on covenant of title, in error from Leavenworth District Court. In September, 1865, Abel H. Peck, George A. Moore, Eugene B. Allen, J. M. Raymond, and Josiah C. Spring, Trustees of the Baptist Church and Society of Leavenworth, sold and conveyed to the plaintiff certain real estate by deed, with covenant for quiet and peaceable possession. [The deed was in the form of an indenture, and recited that the same was made between "A. H. Peck, G. A. Moore, E. B. Allen, J. M. Raymond, and Josiah C. Spring, Trustees, and as trustees of the Baptist Church and Society," etc. The covenant was in these words: "And the said parties of the first part, as such trustees, and their successors," would warrant, etc.; and the testing clause was in the usual form of a deed, without adding "trustees" after the signatures and seals of the signers.] Said deed, so signed and sealed by each of said parties, was acknowledged by them severally, and was duly stamped and recorded.

The plaintiff was evicted under a paramount title, and brought his action on the covenant. Peck, Moore, and Allen were served; the others were not. Moore and Allen answered, *first*, general denial; and *second*, the defendants were trustees, acting for the corporation. Peck was in default. The case was tried by the court. Special findings were made. As conclusion of law, the court found that the defendants were not liable on the covenant. The plaintiff moved for a new trial on the grounds

of error of law occurring at the trial, and that the findings were contrary to law, and not sustained by sufficient evidence, which motion was overruled, and judgment entered for the defendants. This judgment the plaintiff seeks to have reversed.

James M'Cahon, for plaintiff. *Hurd* and *Stillings*, for defendants.

SAFFORD, J., delivered the opinion of the Court: The defendants here and below were, with others, on September 11th, 1865, the trustees of the Baptist Church and Society of Leavenworth City, in this State. On the day named, they executed and delivered to the plaintiff a deed of and to certain real estate situate in the county of Leavenworth, which said deed contained the usual covenants of warranty for quiet and peaceable possession of the said property, and was executed in the individual names, and under the private seals of the parties grantors. Afterward the said real estate was recovered from the plaintiff, under a paramount title, and he brought his action on the covenants in his deed against all of said grantors, and in their individual capacities. These defendants answered, in substance, that they were not liable individually on said covenants, but that they executed the same for and in behalf of the Baptist Church and Society as aforesaid, and as the trustees of such organization. A trial was had which resulted in favor of the defendants by reason of the finding by the court, as a conclusion of law, that they were not liable as individuals on the said covenant of warranty.

I. As to the question where the title to the property of religious corporations vests, there is no room for argument. This is settled by the Constitution, article 12, section 3. If, then, such property is sold, the title thereto must come from and through the trustees, for the time being, of such corporation, and their deed is sufficient to convey such title. This is all conceded in the argument of counsel, and the point may be passed without further mention; though see chapter xlv, section 1, Compiled Laws, 1862, as to preliminary steps.

II. But it is contended that such trustees could not bind the corporation by a covenant of warranty—as it is claimed in their

behalf, in this instance, was done—without a special authority for that purpose having first been given them by the corporation represented by them. And it is further claimed that no such authority is shown by the record. An examination shows the last statement or claim to be correct. It is true, that the court trying the cause found that such authority had been given; but inasmuch as all of the evidence which was introduced on the trial is preserved and brought before us, we may go behind such finding, and examine such evidence with a view of determining for ourselves whether or no that, or indeed any other, finding is sustained by evidence. This we have done, and find *no testimony whatever* going to establish the finding in question. The court therefore erred in making it.

III. The question now recurs, How, under the circumstances, did the making of the warranty affect the corporation which was sought to be represented by these parties defendant? We think that the reply to this inquiry must be, that such corporation was in nowise affected or bound thereby. The covenant was not in the name of, nor was it executed by, the corporation, but was between the defendants, who described themselves in the body of the deed as trustees, etc., but signed it in their individual capacity only, and the plaintiff. The stipulation, also, was in behalf of themselves and their successors, instead of on behalf of said corporation. In such a case it has often been held, and seems to be well settled, that the covenant and stipulation are not that of any supposed principal, but are those of the parties so executing them; and, *a fortiori*, when there is an utter failure to show any authority, either in the instrument itself or otherwise, for the making of such covenant and stipulation for and on behalf of such supposed principal, or to exclude personal responsibility in express terms, 14 Conn. 244. "If a conveyance of real property, purporting to be the conveyance of a corporation, made by one authorized to make it for them, be in fact *executed* by the attorney or agent in his own name, as his own deed, it will not be the deed of the corporation, although it was intended to be so. The conveyance must purport to be made and *executed* by the corporation, acting by its duly authorized agent," 42 Mo. 78. As bearing upon this point, see also 4 Mass. 594; 12 Id. 174; 13 Johns. 310; and other authorities referred to in the decisions named.

But it is said that these defendants intended to bind the corporation as to every agreement in the deed, and that such effect should be given to it, and every part of it, as to carry out such intention. It is perhaps the best and, under the circumstances at least, a sufficient answer to this proposition to say, that they did not do what it is thus claimed they intended, if effect is to be given to the language used according to its naturally received and legal import. (See cases above cited.) And there seems to be no very good reason why the natural and legal construction should not be adopted. But it is further said, that if the parties only bound themselves by their covenant of warranty, then that part of their deed which refers to their successors must be held void. This may be true; but this is only a very small part of the deed, and certainly it is better and more in accord with just and well-established rules of construction, to regard such reference as ineffective for any purpose, or as surplusage, than to give it such force as will do violence to all the remainder of such deed by compelling a meaning to be given thereto which is not expressed, and would not otherwise be suggested. But see as to this part of the case, 14 Conn. 245, and other cases cited by plaintiff in error, which are full, and afford a satisfactory disposition of the questions here involved. Upon the conclusions thus reached in this case, it seems to follow too plainly, and especially from the authorities, to require argument to show it, that these parties must be held to have bound themselves by their said covenant of warranty in the deed to plaintiff in error, and as the record now stands, they must be held to the liability thereby assumed. Upon this point the following cases are referred to: 8 Mass. 162; 4 Id. 594; 15 Pick. 433; 42 Mo. 74; 5 Mass. 299; 6 Id. 58; 10 Ohio St. 444.

The judgment of the District Court is reversed, and the cause remanded with instructions to grant a new trial. All the justices concurring.

ELIZA SHARKLEY, *et als*, v. A. M. TAYLOR, *et al*.

[*Decided in the Circuit Court for the Southern District of Ohio, at the October term, 1857, by Judge HUMPHREY H. LEAVITT. Reported in 1 Bond, 142.*]

The law is well settled, that a person occupying the position of a fiduciary can not be a purchaser of the trust property, even in the absence of any ground for the presumption of actual fraud.

Where three persons were administrators of an insolvent estate, and had obtained an order from the Probate Court for sale of defendant's land to pay debts, and at the sale a note was taken for a part of the purchase-money, payable to the administrators, upon which suit was brought, judgment obtained, and the property offered for sale by the sheriff on execution, and at the sale one of the administrators became the purchaser at two-thirds of the appraisement: *Held*, that such administrator did not occupy a fiduciary relation to the land, and that the sheriff's deed vested a good title to him.

If the purchaser could be viewed on any ground as a trustee under the facts of this case, the creditors of the insolvent decedent, and not the heirs, would be the proper persons to impeach the sale.

Mills & Hoadley, for complainants. *Ball & Skinner*, and *Collins & Herron*, for defendants.

JUDGE LEAVITT delivered the opinion of the Court: The questions submitted in this case arise on a demurrer to a bill in equity. The facts set forth in the bill may be briefly stated as follows: In 1816, James K. Bailey died without issue, intestate and insolvent, seized of an interest of one undivided half in certain real estate in Cincinnati, which he held in common with one John B. Enness, leaving a widow, Eliza Bailey, since deceased, and a sister, Susan Sharkley, wife of Robert Sharkley, a citizen of Adams County, in the state of Pennsylvania, his only heir at law. Susan Sharkley died in said county in 1825, leaving several children, all of tender age, who, including the heirs of one since deceased, are the complainants in this case.

Eliza Bailey, widow of James K. Bailey, and William Barr and James Keys, were duly appointed administratrix and administrators of the estate of said Bailey, and filed their petition in the Probate Court for the sale of the interest of said Bailey in the real estate described in the bill, to pay the debts owing by his estate, in March, 1817; an order of sale was made by said court, and in pursuance thereof, in September, 1818, the prop-

erty was sold to Samuel Still, for the sum of \$2,000, for which he executed his notes in equal amounts, payable in one, two, and three years, secured by mortgage. The sale was approved of, and confirmed by the Court of Probate, and a deed was made by the administrators. The sale, it appears, was made free from any claim of dower by the widow, but with the understanding that in lieu of dower she should receive the interest on one-third of the purchase-money during her life, and that at her death, the principal should be returned to the estate and applied to the payment of the debts.

The purchaser, Still, having failed to pay the notes given for the purchase-money, was sued on one or more of them, and, in 1824, the administrators of Bailey obtained a judgment against him in the Court of Common Pleas of Hamilton County. Execution was issued on this judgment, which was levied on the property described in the bill, of which the said Still was then the sole owner, having previously purchased the undivided interest of said Enness therein. In 1826 the property was offered at public sale by the sheriff of Hamilton County, upon the execution issued as before stated, and was sold to said William Barr for \$1,868, that being two-thirds the appraised value. This sale was confirmed by the court, and an order made requiring the sheriff to execute a deed to the purchaser. The sheriff, by his deed, dated August 31, 1826, conveyed the premises to William Barr, under whom the defendants in this case severally claim title. It is alleged that these defendants purchased with notice of the facts charged in the bill; and the complainants pray that the purchase made by Barr, as above mentioned, may be held to be a purchase in trust for them, and that on being reimbursed to the amount paid by them, with interest, the present claimants may be decreed to convey the proportions of the property held by them respectively to the complainants, and also to account to them for the rents and profits. It is also averred in the bill, that the complainants are now, and have been since their birth, residents of Pennsylvania, and until recently were minors, and had no knowledge of the facts set forth in their bill till about the year 1853.

Upon the facts¹ thus alleged in the bill, the main inquiry presented by the demurrer relates to the character and legal

effect of the purchase of the property by Barr, one of the administrators of the decedent, Bailey. The complainants insist that Barr occupied a fiduciary relation to the property, and that the purchase falls within the settled rules of law, which, on grounds of public policy, prohibits a trustee from purchasing property held in trust. And they ask that the deed to Barr may be held to be a deed of trust, and as such inuring to the benefit of the complainants as the legal heirs of Bailey. In support of the demurrer to the bill, it is contended: 1. That Barr did not stand in the relation of trustee, and that the sale and conveyance vested in him a perfect title in his own right. 2. That as the estate of Bailey was largely insolvent, if a trust estate can be created, Barr held the property as the trustee of the creditors of Bailey, who alone are interested in the question, and that the creditors not being made parties to the bill, no decree can be entered in the case. 3. That if these complainants ever had a claim to relief, they are barred by the lapse of time and the statute of limitations.

It is not proposed to examine the numerous cases referred to by the counsel for the complainants to sustain the doctrine that a trustee can not purchase the property held by him in trust. It is undeniably true, that while some courts have limited the application of the doctrine to cases where, from the facts, there was either actual or constructive fraud on the part of the trustee, the current of decisions is against the validity of purchases by any one holding a fiduciary relation to the property sold, without any inquiry as to the circumstances of the sale, or the motives of the trustee in becoming the purchaser. The courts hold, with great propriety and force of reasoning, that sound policy requires that persons in a fiduciary character should have no temptation to use trust property for their own benefit and to the injury of the *cestui que trust*; and if the present case falls within this principle, the relief sought for by these complainants must be awarded, unless denied to them on other grounds.

But the Court do not perceive the applicability of the rule referred to, to the case stated in this bill. Barr, the purchaser of the property in question, was one of three administrators of an insolvent estate. Upon a proper showing to the Probate Court, by the administrators, that it was necessary to sell the

real estate of the decedent to pay debts, an order for that purpose was made, under which Still became the purchaser of the property. The administrators made return of the sale, and the usual order for its confirmation was made, and also an order that the administrators should convey the "premises to the purchaser." A deed was accordingly executed, which vested the legal title to the property in the purchaser Still. From that time the administrators were separated from all connection with it as fiduciaries. It appears that subsequently, in default of the payment of the notes given by the purchaser for the real estate sold, it became necessary to bring suit on one or more of these notes, in which suit the names of the three administrators were used as plaintiffs. A judgment was obtained by the administrators, and, upon execution against the defendant, the property thus purchased by him at the sale by the administrators, as also the undivided half which he had acquired by purchase from Enness, was levied upon. Having been duly appraised and advertised, as required by law, it was offered at public sale by the sheriff of Hamilton County, and Barr, being the highest bidder, was the purchaser. The sale thus made was confirmed by the proper court, and in pursuance of the order of the court, the sheriff conveyed the property to Barr.

It may be remarked here, that there is no allegation in the bill, nor any ground presented for an inference, that these proceedings were not conducted in the most perfect good faith. The sum bid for the property by Barr being two-thirds its appraised value, after applying one-third to the widow's claim of dower, was paid to the administrators, and by them distributed to the creditors of the estate. Neither is there any averment in the bill that Barr made any profit for himself by the purchase.

The main ground on which courts have rested their condemnation of fiduciary purchases is, that the trustee has control of the sale of the property, and thus is exposed to the temptation of resorting to fraudulent management in the sale, thereby to subserve his own interests at the sacrifice of the interests of those for whom he is the trustee. Hence, at a sale by administrators or executors of property belonging to their decedent, they are not allowed to become purchasers, for the reason that they appoint the time and place, and have the entire management of

the sale. But this has no application to the sale at which Barr was the purchaser. The property sold to him was not trust property, the title, legal and equitable, having been vested in Still, the defendant in the execution. It was levied upon and sold to satisfy the execution against him. The sale, and all the proceedings connected with it, were conducted by the sheriff, the officer who by law was authorized to perform this duty, without any interference or attempted control on the part of Barr or his co-administrators.

It would seem to be a clear proposition that a sale thus made is not liable to the objections which usually invalidate a fiduciary sale. It is clearly not within the principle on which such sales are held to be void, for the reason that the purchaser, though his name as administrator was necessarily used in the suit against Still, had no control over the sale. It was impossible, therefore, that by any agency on his part, he could prevent the fullest competition at the sale, or by any device or management effect a purchase at an unfair price.

Two cases have been referred to by counsel, one from the Vermont and one from the Georgia Reports, in which it is said the court ignored the distinction between a purchase by an administrator or executor of property held as the representative of a decedent, and property levied on to satisfy a judgment in which an administrator or executor is a party plaintiff. I have not had an opportunity of referring to these cases, and do not, therefore, know the precise grounds on which the decisions were placed. But, considering the distinction intimated as obvious, and as entitled to a controlling influence in the consideration of the question, I am not prepared to sanction the doctrine which the cases cited are supposed to sustain. It is not within the reason of the rule of law condemning fiduciary purchases, and there is certainly nothing in the facts presented in the bill requiring so stringent an application of the doctrine. As before intimated, there does not appear to have been any unfairness, much less fraud, in the purchase of the property in question. It was sold at its fair value, and its proceeds applied to the payment of the debts owing by the estate (a).

(a) *Armstrong's Appeal*, 68 Penn. State (18 P. F. Smith), 409: The wife of an administrator purchased land at his sale as administrator, made by order of the

But if the facts presented warranted the implication that Barr, the purchaser of the property, can be viewed as having acquired merely a trust estate, the inquiry may properly be made, To whose benefit did the trust inure? The estate of the decedent, Bailey, was insolvent, and paid only fifty cents on the dollar of the debts owing. It would seem, therefore, that his heirs could have no possible interest in the sale and disposition of his estate, as there is no pretense that in any event there would have been any surplus for distribution after the payment of the debts. If, therefore, there is any ground of complaint against the administrators, it should be urged by the creditors, and not by the heirs of Bailey. But the creditors are not parties to this bill, and ask nothing at the hands of this Court; and this is a full answer to the prayer of the bill, so far as the equity of the heirs is concerned.

The case of *Chronister v. Busbey*, 7 Watts & Serg. 152, is cited as sustaining the doctrine that it is the right of the heirs to impeach a sale by an administrator or executor, even where the estate is insolvent. In that case, however, the property belonged to the estate of which the administrator was the representative. It was, in fact, a sale by the administrator, and of which he had the entire control, and there were facts in the case justifying the inference of fraud on the part of the administrator. It was possible that if the sale had been fairly made, and the property sold at its full value, there might have been a *residuum* for the heirs. The court held, therefore, that as the heirs had a remote or contingent interest in the sale, it was competent for them to impeach it without the interposition of the creditors of the estate. It is not necessary to inquire into the correctness of the decision in the case referred to. The facts

Orphan's Court; and the sale was confirmed. Afterward she sold at an advance of \$1,346.68. At a still later period the administrator filed his accounts for settlement, accounting for the amount for which the property was sold. On exceptions to his account, the same was referred to auditors, who reported that in their opinion, the sale to the wife "was entirely *bona fide*, and untainted with fraud." Notwithstanding, they charged the administrator with the \$1,346.68, which was allowed by the Orphan's Court, and Armstrong, the administrator, appealed. *Held*, that the administrator could not be charged with the profit in this proceeding, and that by the confirmation of the sale, the price with which the administrator should be charged was judicially ascertained.

in that case have no analogy to those in the case before the Court, and the law as sanctioned by the Pennsylvania court has no application to this case.

Regarding the reasons stated as conclusive against the right of the complainants to the relief sought for, the demurrer is sustained, and the bill dismissed. It is not, therefore, necessary to inquire or decide whether the complainants are barred by the statute of limitations or lapse of time.

MARY T. B. JAUDON v. THE NATIONAL CITY BANK, DUNCAN,
SHERMAN & Co., et al.

[Decided in May, 1871, in the United States Circuit Court for the Southern District of New York, by Judge SAMUEL BLATCHFORD. Reported in 8 Blatchford's Cir. Ct. Rep. 430.]

In this case, persons who made loans of money to a trustee, on certificates of stock, and afterward sold the shares of stock to repay the loans, were held liable to *cestui que trust* for the proceeds of the shares, it appearing that the certificates stated that the holder, naming him, held them in trust, and gave the name of the *cestui que trust*; that the transactions of loan indicated that the trustee was not selling the shares in the ordinary course of business, as trustee, but that he was borrowing money, for his private use, on a pledge of what was in his hands as trust property; that the sales of stock were made by the lenders, with the knowledge that the proceeds were to be applied to pay the private debts of the trustee to the lenders; and that the lenders applied the proceeds to pay such private debts.

A trustee stands on a different footing from an executor, or an administrator, or even a guardian, in many respects. He presumptively holds his trust property for administration, and not for sale.

Theron B. Strong, for plaintiff. William H. Arnoux, for the National City Bank. William W. M'Farland, for Duncan, Sherman & Co.

BLATCHFORD, J.: The plaintiff is the wife of the defendant, Charles B. Jaudon. She is a daughter of the late Commodore William Bainbridge, who died in 1833, leaving a will, under the provisions of which she has a separate estate of her own, placed by the will in trust for administration. By the will, the testator, after making certain legacies, directed that all his real

estate should be sold, and appointed William Lynch and Hugh Calhoun to be trustees to receive all the residue of his estate, "and to invest the same in the stocks of the United States, or the stocks or funds of any individual State, and to hold the same in trust for the following purposes:" (1.) Twenty-eight thousand dollars to be invested and the interest of it to be paid to his wife for her life, and at her death such stocks or funds to be equally divided among his four daughters (the plaintiff being one), "the trust to remain the same for their sole use and benefit." (2.) Enough to be invested to create an annual interest of \$150, to be paid to his sister Mary during her life, and, at her death, the invested amount "to be in trust, equally divided" between his said four daughters. (3.) In respect to each one of said four daughters, an equal one-fourth part of his remaining estate to be invested in the funds or stocks before mentioned, in trust, the interest whereof to be paid to the daughter for her sole use and benefit during her life, and at her death, the amount so invested to be divided equally among her children. By a codicil, he directed that the loan which he held of the city of Philadelphia, and the Southwark loan and the ground-rents be not sold, but be considered by the trustees as equal to the stocks or funds before mentioned. The trustees named in the will were, in May, 1835, on their own petition, discharged from their trust by the Court of Common Pleas for the city and county of Philadelphia, and the defendant, Samuel Jaudon, was at the same time appointed by that court, trustee under said will, for the widow, the sister, and the four daughters, and, in June, 1835, he received from the out-going trustees all the trust estate held by them. At the death of the testator, a considerable portion of his estate consisted of stock of the State of Pennsylvania, paying an interest of five per cent per annum. The trustees named in the will made no change while they continued to be trustees, in any of the investments, but left them as they were at the death of the testator. Soon after Samuel Jaudon was appointed trustee, he sold the Pennsylvania stock and invested its proceeds in stock of the Delaware and Raritan Canal Company. This stock he apportioned among the trusts created by the will, allotting to the trust for the plaintiff ninety-three shares. Although this was an investment not authorized by the will, the plaintiff

approved of it, and from time to time received from the trustee the dividends made on the ninety-three shares. In 1857, the widow died, and the Delaware and Raritan Canal stock, which belonged to the trust for her, was divided by the trustee among the trusts for the four daughters, twenty-eight shares of it going to the trust for the plaintiff. Thus the trust for the plaintiff embraced one hundred and twenty-one shares of Delaware and Raritan Canal stock, and the plaintiff thereafter received, from time to time, from the trustee, the dividends made on the one hundred and twenty-one shares, knowing of the investment. Afterward, some property which had belonged to the testator was sold, and, from that source and other sources, the trustee came to hold under the trust for the plaintiff, in addition to the one hundred and twenty-one shares of canal stock \$5,600 in United States stock, known as five-twenty bonds.

The bill seeks to make the trustee, Samuel Jaudon, responsible for the value of the \$5,600 of United States stock and of one hundred and seventeen shares of the canal stock, as having been disposed of by him in breach of his trust, and to have him removed from his trust and another trustee appointed in his place. It also seeks to make the defendants, the National City Bank, responsible for the value of forty-seven shares of the canal stock, and to make the defendants, Duncan and others, who compose the firm of Duncan, Sherman & Co., responsible for the value of seventy shares of the canal stock, as having been received by them respectively from the trustee, and sold and appropriated to their use respectively, under circumstances which make them liable equally with the trustee, to the plaintiff, for the breach of trust committed by such trustee.

On the 16th of October, 1865, Samuel Jaudon applied to the National City Bank for a loan of \$6,000 on a pledge or hypothecation of forty-seven shares of the stock of the Delaware and Raritan Canal Company, evidenced by two certificates of stock, one for nineteen shares and one for twenty-eight shares. The \$6,000 was loaned to him by the bank, October 16th, 1865, on that security, he giving to the bank no obligation note or due-bill for the loan, but merely depositing with it the two certificates, the loan being regarded as a loan strictly on demand, but practically as one for three months. The certificate for the

nineteen shares was dated January 27th, 1852, and certified that "S. Jaudon, trustee for Mrs. Mary T. B. Jaudon," was entitled to that number of shares in the capital stock of the company, transferable on the books of the company, and on surrender of such certificate, only by him or his legal representative. The certificate for the twenty-eight shares was dated April 14th, 1864, and certified that "S. Jaudon, trustee of Mrs. Mary T. B. Jaudon," was entitled to that number of shares in the capital stock of the company, transferable on the books of the company only by him or his legal representative. Accompanying the two certificates, when they were so deposited with the bank, but on a separate piece of paper, was an instrument dated April 18th, 1864, signed "S. Jaudon, Tr. of M. T. B. Jaudon," and stating that "Sam'l Jaudon, trustee of M. T. B. Jaudon," thereby sold unto — forty-seven shares "of the joint stock of the Delaware and Raritan Canal Company, and Camden and Amboy Railroad and Transportation Company," standing in his name on the books of said companies, and appointed — his attorney to transfer such stock. On the 27th of November, 1865, the bank loaned to Samuel Jaudon the further sum of \$3,500 on a pledge of the same forty-seven shares of stock with other securities. He repaid this loan of \$9,500, with interest, on the 17th of January, 1866. He borrowed from the bank the like sum of \$9,500 on a pledge of the same securities, on the 19th of January, 1866. This transaction of the borrowing by him from the bank the like sum of \$9,500 on a pledge of the same securities, was repeated seven times more, namely: on the 18th of April, 1866, the 19th of July, 1866, the 13th of October, 1866, the 19th of January, 1867, the 13th of April, 1867, the 6th of July, 1867, and the 12th of October, 1867. Such loan on the 19th of January, 1866, was repaid, with interest, on the 11th of April, 1866. The first six of the remaining seven loans were repaid, with interest, severally, on the 16th of July, 1866, the 10th of October, 1866, the 14th of January, 1867, the 10th of April, 1867, the 29th of June, 1867, and the 10th of October, 1867. The loan of the 12th of October, 1867, not being paid on demand, the bank, on the 10th of December, 1867, sold the forty-seven shares of stock, at the request of Mr. Jaudon,

for the net sum of \$5,897.90, which was applied on account of the loan on the 11th of December, 1867. The securities were returned to Mr. Jaudon every time he paid up the amount of a loan, and redelivered to the bank by him every time a new loan was made to him.

On the 18th of July, 1867, Samuel Jaudon applied to the defendants, Duncan, Sherman & Co., for a loan of \$7,000, which was made to him by them on that day, on the pledge or hypothecation of seventy shares of the stock of the Delaware and Raritan Canal Company, evidenced by one certificate of stock for seventy shares. The amount was loaned on that security alone. It was a loan at ninety days. Whether a note was given for it or not, is not certain. The certificate was deposited with Duncan, Sherman & Co. at the time the loan was made. The certificate was dated December 13th, 1851, and certified that "S. Jaudon, trustee for Mrs. Mary T. B. Jaudon," was entitled to seventy shares in the capital stock of the company, transferable on the books of the company, and on surrender of such certificate, only by him or his legal representative. Accompanying the certificate, when it was so deposited with Duncan, Sherman & Co., but on a separate piece of paper, was an instrument signed "S. Jaudon, Trustee of M. T. B. Jaudon," and stating that "S. Jaudon, Trustee of M. T. B. Jaudon," thereby sold unto — seventy shares "of the joint-stock of the Delaware and Raritan Canal and Camden and Amboy Railroad and Transportation Comp'ys," standing in his name on the books of the said companies, and appointed — his attorney to transfer the stock. On the 16th of October, 1867, when the ninety days expired, Mr. Jaudon obtained from Duncan, Sherman & Co., on the same stock, a further loan of \$600, and at the same time gave directions to them to sell the stock. Between the 16th of October, 1867, and the 21st of October, 1867, the seventy shares were sold by Duncan, Sherman & Co., for the net sum of \$8,699.12. On the last-named day, the loans, with interest, amounted to \$7,729.88, and on that day, Duncan, Sherman & Co. applied that amount, from the proceeds of the sale, to the payment of the loans and interest, and paid over to Mr. Jaudon the remainder of the proceeds, amounting to \$969.24. The power of attorney, accompanying the certificate

for the seventy shares, is dated October 16th, 1807 (a mistake for 1867), and that date was probably filled in October 16th, 1867, and it bears the signature, as a witness to its execution, of Mr. J. C. Hull, the cashier of Duncan, Sherman & Co., who, at the direction of Mr. William B. Duncan, of that firm, transacted the business of receiving the certificate and transfer and power of attorney, from Mr. Jaudon, and furnishing him with the money loaned.

The sales of the one hundred and seventeen shares were made under the power of attorney before named, the blanks therein having been filled up at the office of the company, when, under the powers, the shares were transferred on its books, and the certificates were surrendered. Notwithstanding the sale of the shares, Mr. Jaudon, in February, 1868, paid to the plaintiff an amount of money equal to the amount of the dividend then paid on the one hundred and seventeen shares, and in August, 1868, he paid to her the sum of \$205, as on account of the dividend then paid on such shares. Since that time she has not received any thing on account of the income of the shares, nor have they been restored to the trust. The plaintiff did not know of any of the loans, or of any of the pledges of the shares, or of the sale of any of the shares, until the month of December, 1868. She never authorized or ratified any of the transactions. Mr. Jaudon used the moneys obtained by him from the bank, and from Duncan, Sherman & Co., on the loans, to pay which the stocks were sold, to discharge indebtedness incurred by him individually in making investments in stock of the Broad Top Coal and Iron Company, which he anticipated would be remunerative; and, if they were, he had the intention of offering to the plaintiff shares in such company, to replace the one hundred and seventeen shares. Such investments were made by him in his individual name. The plaintiff had no knowledge of such use of the moneys, or of such investments, or of such intention. The investments turned out to be worthless, and the stock was never offered to her. Mr. Jaudon is insolvent, and the trust has never received any of the proceeds of the stock, or any moneys, in replacement thereof. The evidence shows, that when Mr. Jaudon applied to Duncan, Sherman & Co., for the original loan, he informed Mr. Duncan about his

having made investments in the Broad Top Company, and made known to him his expectation of being able to repay the loan from the fruits of such investments.

There is no foundation in the evidence for the proposition that Mr. Jaudon had any authority from the plaintiff, either special or general, to sell or dispose of the one hundred and seventeen shares, or to pledge the same, or borrow money on them. The stock was a valuable stock. The forty-seven shares sold for over 25 per cent net above par, and the seventy shares for over 24 per cent net above par. The semi-annual dividends upon it had averaged 5 per cent, in money, and it had occasionally made dividends in stock besides.

On these facts there can be but one conclusion, and that is, that not only Mr. Jaudon, the trustee, but the bank and Duncan, Sherman & Co., must respond to the trust for these shares of stock; the bank for the forty-seven shares, and Duncan, Sherman & Co. for the seventy shares. The certificates, on their face, not only stated that Mr. Jaudon held the shares in trust, but gave the name of the plaintiff as the *cestui que trust*. The powers of attorney indicated that he was transferring the shares so held by him in trust. The transactions of loan indicated, not that he was selling the shares in the ordinary course of his business, as trustee, but that he was borrowing money for his private use, on a pledge of what was in his hands as trust property. The sales of the stock, when they were made by the pledges, were made by them with knowledge that the proceeds were to be applied to pay the private debts of the trustee to the pledgees, and the pledgees applied the proceeds to pay such private debts. In regard to Mr. Duncan, he was informed that the loan was to be repaid by Mr. Jaudon out of the fruits of investments which he had made in the stock of a company which was named. That stock was a stock which Mr. Duncan was bound to know was a security in which it was unlawful, by the general principles of law, and in the absence of special authority, for a trustee to invest trust funds. He must, therefore, be held chargeable with knowledge that the loan was to be repaid from sources with which the trust could have no connection, and, therefore, from sources altogether private to the borrower. In regard to the bank, the making of ten separate loans to Mr.

Jaudon, running through a period of two years, upon the pledge of the stock, evidenced by such certificates, must be held as charging the bank with notice that Mr. Jaudon was borrowing the money for his private uses, on a pledge of trust property. The circumstances were such as to put the parties on inquiry. Inquiry would have directed them to the *cestui que trust*, and the unlawfulness of the transactions would have been disclosed. They made no inquiry, even of Mr. Jaudon, as to how it was that he was borrowing money on a pledge of shares held by him as trustee. The case is not even one of a sale of the shares directly, which might presumably be within the scope of the authority of a trustee, with a view to a reinvestment within such authority. A trustee, however, stands on a different footing from an executor or an administrator, or even a guardian, in many respects. A trustee presumptively holds his trust property for administration, and not for sale; and, according to the well-settled principles of equity, a pledge by him of certificates of stock like those in this case, as security for loans of money made to him under circumstances like these in this case, entitles the *cestui que trust* to follow the property into the hands of the pledgee and reclaim it from him, where he has received the fruits of it, and there was in fact a breach of trust in making the pledge. The transactions with the pledgees in this case negatived the idea that Mr. Jaudon had any purpose, in borrowing the money, of selling the stock, and, therefore, negatived the idea that his action could be that of a trustee selling the stock. He said plainly, by the transactions, that he did not wish to sell the stocks; that, as between him and the trust, no such thing as a sale of the stocks was the purpose of the transactions; and that he intended to repay the borrowed money, and reclaim the stocks.

The pledgees had reasonable ground for believing, when they made the loans, to pay which the stock was sold, that Mr. Jaudon intended to apply the money loaned to his private uses. They enabled him to commit the breach of trust which he committed. What he did was accomplished by their co-operation. The law implies notice to them of the terms of the trust, whose existence the certificates disclosed. It was negligence in them to take the certificates in pledge for the loans, without inquiry. Such inquiry of the plaintiff would have shown that the borrow-

ing of the money was for no purposes of the trust. They must bear the consequences of their negligence, *M'Leod v. Drummond*, 17 Vesey, 152; *Field v. Schieffelin*, 7 Johns. Ch. 150; *Lowry v. Commercial and Farmers Bank*, Ch. J. Taney's Decisions, 310; *Pendleton v. Fay*, 2 Paige, 202, 205; *Shaw v. Spencer*, 100 Mass. 382, 389-392; *Bayard v. Farmers' and Mechanics' Bank*, 52 Penn. 232; *Baker v. Bliss*, 39 N. Y. 70, 73, 76; *Carr v. Hilton*, 1 Curtis' C. C. 390, 393.

The bill has been taken as confessed against the defendant, Samuel Jaudon. There must be a decree that he account for the United States stock appropriated by him to his own use, with the interest that would have been received thereon, and for the one hundred and seventeen shares of the stock of the Canal Company, and for the dividends thereon, and that he restore such property to the trust, or pay its value into Court. There must also be a decree against the bank and Duncan, Sherman & Co. severally, that they account severally, the former for the forty-seven shares, and the latter for the seventy shares, of the stock of the Canal Company, pledged with them severally, and sold, and for all dividends thereon since made, and restore such shares and property to the trust, or pay its value into Court. It will be referred to a master to take and state such accounts, allowing the proper credits. All other questions are reserved until the coming in of the report of the master (a).

(a) *Breckenridge v. Glasse*, 1 Craig & Phillips (18 Eng. Ch.), 126: Part of a sum of money which had been raised by a husband upon the security of property comprised in his marriage-settlement, by means of a suppression of the settlement, was lent by him to the trustee of the settlement upon his bond, the trustee being ignorant of the means by which the money had been raised. After the death of the husband, the wife, who was entitled to a life-interest in the settled property, with remainder to her children, took out administration to her husband, and filed a bill, in her own name and in the names of her children, by herself as their next friend, against the trustee—who had in the mean time taken the benefit of the insolvent debtor's act—praying that the sum due upon the bond (which the widow, as administratrix, offered to deliver up), might be replaced, with interest, upon the trusts of the settlement. *Held*, that the widow and children had a clear equity to follow the money in the hands of the trustee, and that they would have had the same equity if, instead of being a trustee, he had been a stranger; and *semble*, that such a claim would not have been barred by the trustee's discharge under the insolvent debtor's act, even if it had been proved (which it was not) that the bond debt had been included in his schedule.

WALL v. COCKERELL, *et als.*

[Decided in the House of Lords in 1862, the Lord Chancellor WESTBURY delivering the opinion, and Lord CHELMSFORD concurring, reversing the judgment of the late Lord Chancellor CAMPBELL. Reported in 10 House of Lords Cases, 229.]

Where money is intrusted by A to his solicitor for investment, but without any particular investment being then in contemplation, and it is allowed to remain in the hands of the solicitor, the amount becomes a debt due from the solicitor to A. If the solicitor afterward misapplies the money, and to cover his fraud obtains from another client, B, upon a false representation, a transfer of B's equitable interest under a previously executed mortgage, no money of A being then paid to B, the transfer thus obtained may, on B's discovering the fraud, be set aside in equity, for no money of A having been received by B at the time the transfer was executed, no interest passed to A by its execution.

What circumstances may constitute acquiescence of B in the solicitor's fraud, and deprive him of the right to relief.

The Solicitor-General, Sir R. Palmer, and Mr. John Pearson, for appellants. Mr. Selwyn and Mr. Surraye, for respondents.

THE Lord-Chancellor WESTBURY: My Lords, the respondents are the trustees of the marriage-settlement of Mr. and Mrs. Grieve. They employed, as their solicitors, Henry and Cheslyn Hall, who were in partnership as solicitors in London. A sum of 15,000*l.* having become payable to the respondents as such trustees, they directed it to be paid to Messrs. Hall, to be invested upon mortgages to be found by Messrs. Hall. The money was accordingly, on the 4th February, 1853, paid into the banking-house of Messrs. Dixon & Company, the bankers of Messrs. Hall, to the credit of their private account. The money was not in any manner separated or distinguished from the moneys belonging to the Messrs. Hall. No particular securities were in contemplation at the time of such payment. The sum of 15,000*l.*, therefore, became in law a debt due to the respondents from Messrs. Hall.

The first use which the Messrs. Hall made of part of the money so acquired was to apply 5,000*l.* in discharge of a debt due from them to their bankers. They then invested 10,000*l.*

upon mortgage of an estate belonging to a Mr. Commerell, and represented to their clients, the respondents, that the whole of the 15,000*l.* had been duly invested, and upon one security. Interest on the 15,000*l.*, as if it had been so invested, was paid by Messrs. Hall to the parties entitled under the trust.

In the year 1854, the respondents became dissatisfied with Messrs. Hall, and in July of that year they were discharged from being solicitors to the respondents, and the securities of the 15,000*l.* were demanded.

Messrs. Hall were the confidential solicitors of the appellant, who was a very young man, entitled for life to large real estates, of which the Halls had the entire management. They were also the trustees and executors of the will of the appellant's brother, and had the whole control of the property which the appellant was entitled to under that will. The appellant was completely in their power, and placed in them the most absolute confidence. The Halls, therefore, formed the design of getting the appellant to execute deeds which they might hand over to the respondents as the securities for the 5,000*l.* which they had appropriated to their own use. Accordingly, they prepared two deeds of mortgage of the life-interest of the appellant in the Worthy estate, one for the sum of 4,000*l.* and another for the sum of 1,000*l.* The mortgage for 4,000*l.* is made to bear date on the 1st March, 1853. The mortgage for 1,000*l.* bears date the 1st August, 1853.

Policies of insurance on the life of the appellant are included in both securities; but the policy included in the mortgage for 4,000*l.* was effected in 1849, and that included in the mortgage for 1,000*l.* was not effected until the 5th July, 1853, which appears to be the reason why that deed was made to bear date the 1st August, 1853.

The respondents having become very peremptory in their demands for the securities, Messrs. Hall, on the 1st September, 1854, delivered the mortgage deeds for 10,000*l.*, together with these two mortgages for 4,000*l.* and 1,000*l.*, and the policies of insurance, to the solicitor of the respondents. They were accepted without difficulty, and no inquiry appears to have been made; and yet the circumstances were such as should have awakened very grave suspicions on the part of the trustees, who

had already seen fit to discharge Messrs. Hall from being their solicitors. On the 9th February, 1853, Messrs. Hall had written to Mr. Grieve that they had "concluded the arrangements as to the new mortgage;" namely, the mortgage for the 15,000*l.* On the 20th April, 1853, Mr. Cheslyn Hall had written to Mr. Grieve in these words: "The 15,000*l.* was [were] lent in one sum to one party." These definite statements were contradicted by the securities delivered.

When the appellant executed the deed of 1st March, 1853, is not clearly ascertained, but it certainly was not long after the date of the instrument. As to the deed dated the 1st August, 1853, it is proved that it was not even prepared until the latter end of August, 1854, when Messrs. Hall, no longer able to evade the demands of the respondents, were compelled to complete the making up of securities for the 5,000*l.* that were due from them.

The appellant swears that he knew nothing of the deeds, and that he must have executed them on the representations of Messrs. Hall that they were instruments of a different nature. But it is not necessary for him to put his case so high; it is sufficient to suppose that he executed the deeds in the faith that the respondents had paid, or would pay, the consideration moneys to Messrs. Hall, as his solicitors and agents.

The legal estate in the property comprised in the mortgage deeds was, and is, outstanding, and the deeds would operate in equity only upon such equitable interest as the appellant was entitled to. But no interest whatever would pass to the respondents until the consideration moneys were either actually paid or applied unto or for the use of the appellant, or paid by the respondents under such circumstances as would estop the appellant from denying that he had received them.

On the question of payment, the case is exceedingly plain and simple. No payment of the 5,000*l.* can be pretended to have been actually made by the respondents, except the payment of the 15,000*l.* on the 4th February, 1853, which was a deposit by them in the hands of their own agents, Messrs. Hall, for the purpose of being invested on proper securities. The sum of 5,000*l.* was misapplied by their own agents, who were intrusted with it long before the appellant's securities were executed, and it is not pretended that one shilling of the 5,000*l.*

was subsequently paid or applied by the Messrs. Hall unto or for the use of the appellant.

The respondents rely on the fact that the deeds, with receipts for the consideration moneys, signed by the appellant, were, on the 1st September, 1854, delivered to the solicitor of the respondents, and they contend that the appellant is thereby estopped from denying the receipt of the money. And if the respondents were in a condition to prove that they had ever paid any sum of money to the Messrs. Hall for the use of the appellant, or (as already observed) that the Messrs. Hall had applied any part of the respondent's money for the benefit of the appellant, the respondents would be *so far* entitled to retain the benefit of the mortgage. But these are the particulars in which their case is wanting.

When the mortgage deeds were handed over to the respondents on the 1st September, 1854, they paid nothing on the faith and credit of the appellant's receipts, but took the deeds, trusting to the representations of Messrs. Hall, to whom they had confided their money, and by whom that money had been spent before these mortgages were thought of; and they now want to convert this payment to the Messrs. Hall as their own agents, into a payment to them as the agents of the appellant.

But the decree which the respondents have obtained from the late Lord Chancellor is vested on the ground of acquiescence and confirmation by the appellant of the respondent's title. The words of Lord Chancellor CAMPBELL are, "I proceed upon the ground that the plaintiff has confirmed the validity of the mortgages with the knowledge or means of knowledge of the material facts of the case." Now, the material facts of the case are the facts which constitute the appellant's equity or title to relief. It is for the sake of clearly explaining the true nature of the appellant's equity that I have made the antecedent full statement of the case. The material facts that constitute the plaintiff's title are, that no sum of money was ever paid by the respondents to the appellant or his agents on the credit or for the purpose of these mortgages, and that all which the respondents have done has been to abstain from demanding repayment of a sum of 5,000*l.*, which they had intrusted to their own agents, Messrs. Hall, on the faith of the assurances of Messrs. Hall that

they had paid that sum to the appellant, whereas, in truth, the Messrs Hall had never paid or given credit for any part of that sum to the appellant.

It is most clear that these facts were not known to the appellant until the month of April, 1859. The respondents knew from the beginning, that unless the Messrs. Hall had paid or applied for the use of the appellant the debt which, on the 4th February, 1853, became due from them to the respondents, no consideration had been given for the mortgage; and the appellant, until some time in April, 1859, had reason to believe, both from the demands of the respondents and the assurances of Messrs. Hall, that the 5,000*l.* had been *bona fide* paid by the respondents to the Messrs. Hall on the credit and for the purposes of the mortgages. The bill is filed within a month after the truth is discovered.

Under these circumstances, it is impossible to impute to the appellant laches or acquiescence, or an intention of confirming the respondents' title. The burden of proving such a case would lie on the respondents, and could not be discharged, except by proving that the appellant was aware of the time and manner in which the respondents' money was deposited with the Messrs. Hall, and of the fact that no part of it had been applied for his own use or benefit. The case is plain and simple, as soon as the true nature of the appellant's equity is rightly apprehended. I shall, therefore, move your Lordships to reverse the decree of Lord Chancellor CAMPBELL, and to direct that the petition of rehearing presented to him be dismissed with costs. The decree of the Court of Chancery was accordingly reversed.

GILLILAND v. CRAWFORD.

[*Decided in the Vice-Chancellor's Court of Ireland, in 1869, HEDGES E. CHATTERTON, Vice-Chancellor. Reported in 4 Irish Reports (Equity Series), 35.*]

Executor.—Tenant for life—Right of executor who has expended money in improving testator's real property, for the moneys expended—Right of tenant for life against remainder-man—Right of trustee as against cestui que trust.—C was, at the time

of his death, seized of a plat of ground upon which he had commenced to build certain houses. By his will he devised and bequeathed all his real and personal property to his father for life, upon trust, as to one moiety of the rents and profits for himself, and as to the other for other parties, with remainder over. The father became the personal representative of C, and after his death expended large sums of money in completing the houses. *Held*, that the father was not entitled to a charge upon the plat of ground for the moneys expended by him, either as a tenant for life, trustee, or personal representative of C.

THIS case came up on a motion for a decree. The opinion of the Vice-Chancellor states sufficient facts in the case to make the points passed upon by him sufficiently clear to be well understood by the profession.

Mr. *M'Causland*, Q. C., Mr. *Carson*, Q. C., and Mr. *H. Holmes*, for the plaintiff. Mr. *Pilkington*, Q. C., and Mr. *J. A. Byrne*, for Mr. and Mrs. Wilson and their children.

By the VICE-CHANCELLOR: The claim of the representative of the Rev. James Crawford has been put forward upon two distinct grounds: first, as that of a tenant for life to have or charge upon the inheritance for expenditure in permanent improvements; and, secondly, as that of a trustee to have a charge upon the trust estate. He, to a certain extent, filled both characters; for he took a legal estate in the whole for his own life, being beneficially entitled for life to one undivided moiety, and a trustee for life of the other moiety, the annual proceeds of which were to go to Mrs. Wilson, for the benefit of her children, the minor defendants. On the death of James Crawford, the trust estate given to him ceased, and the persons entitled in remainder took legal estates in the freeholds. It appears to me, therefore, that the case must be considered in both views; and I shall deal with it first with respect to the relation of tenant for life and remainder-man on which it was chiefly rested. The relief prayed by the bill has been admitted to be too extensive, and it is now sought to have the expenditure declared to be a charge only upon that piece of ground on part of which the buildings have been erected. I shall assume that the building of these houses had caused a considerable permanent addition to the value of this whole piece of ground. The cases of *Nairn v. Majoribanks*, 3 Russell, 582; *Caldecott v. Brown*,

2 Hare, 144, and others which have been referred to in the course of the argument, establish the general principle that a tenant for life who lays out his money in making substantial improvements, by which the value of the inheritance has been permanently increased, does not thereby acquire any right to a charge upon the inheritance for any portion of such outlay, and that an inquiry as to how much the estate in remainder has been benefited by such outlay will not be directed. Consequently, the mere increase in value of this piece of ground by Rev. James Crawford's outlay gives his representative no right against the estate in remainder. But it was contended on the part of the plaintiff that the fact of these buildings having been partly erected by the testator took the case out of this general rule; and in support of this contention, *Hibbert v. Cooke*, 1 S. & S. 552, and *Dent v. Dent*, 30 Bea. 363, were relied on. In the former of these cases, the building was a mansion-house for the owner of the estate, and in the latter, the only claim of a similar nature which was allowed was also for the completion of a mansion-house commenced by the testatrix. There were other claims in *Dent v. Dent*, which were disallowed, and which it is important to consider. It is necessary to ascertain whether these claims in *Hibbert v. Cooke* and *Dent v. Dent* were allowed because the building had been commenced, or because it was a mansion-house. It is evident from the consideration of the claims disallowed in *Dent v. Dent*, that the intentions of the testatrix to make the permanent improvements claimed for did not justify the tenant for life in executing them with a view to obtaining a charge on the inheritance. It was there clearly established that the testatrix had intended to build the farm-houses, farm-buildings, and cottages erected by the plaintiff upon parts of the estate in place of others which had become ruinous and unfit for use, and the plans of some of them had been prepared and submitted to her. The Master of the Rolls gave the tenant for life a charge upon the estate for the sums expended upon the mansion-house, but not for those expended upon the farm-houses, farm-buildings, and cottages.

I do not think that the commencement of a building is enough to account for the distinction, and if it were, I do not know where I could draw the line. If there had been only an expenditure

of five pounds, would it be enough? It would be impossible to draw any line as to what expenditure in the life-time was and was not sufficient. The case of *Joliffe v. Myford* shows that the commencement of a work with the full intention of completing it is not sufficient, although the claim of the tenant for life to have it completed out of the assets, which is analogous, was aided by an obligation expressly imposed on him to keep the column in repair. It appears to me that the claims allowed in these cases were allowed because the partly erected building was a mansion-house; nor is that a mere shadowy distinction. The mansion-house is meant for the enjoyment of the persons successively in possession of the estate. It is not intended to be let, or to be advertised for sale, and is generally placed on the most desirable site on the estate; therefore, if it be not completed, the money already spent on it must be lost, and the building must fall into ruin and become an unsightly incumbrance. But here no such considerations can apply, for these houses were in no way intended for the personal occupation of the persons entitled to the property. They were erected for the purpose of being disposed of. There was nothing to prevent their being let as they stood at the death of the testator; and the materials provided by him might have been probably advantageously disposed of with them, and used by a tenant for their completion. Therefore, the non-completion of them by the tenant for life did not necessarily lead to a loss of the outlay already made, nor the inconvenience of becoming a ruin, and thus disfiguring the estate. I am, accordingly, of opinion, that the expenditure did not come within the principle of *Hibbert v. Cooke*, or the first claim in *Dent v. Dent*.

It was next argued that this is a case between trustee and *cestui que trust*; but I can not hold that, after the death of the Rev. James Crawford, any such relation existed, and there is not now any trust estate subsisting which could support any such lien. Besides, Rev. James Crawford was only a trustee, even during his life, as to one undivided moiety. But even if any such relation were continuing, and if he intended to avail himself of it to complete the buildings out of his own money, and then to claim a lien upon the trust property, on the ground that it was desirable that this expenditure should be made for the

benefit of all concerned, he could have come to this Court for its sanction before making it. I quite admit that this Court will ratify an act when done by a trustee *bona fide* which it would have authorized beforehand if asked so to do.

But I think there would have been very great difficulty in getting this Court to sanction the expenditure here. I assume *bona fides*, and that James Crawford acted on a reasonable expectation of profit from the buildings, and that the premises were completed without extravagant and wasteful expenditure. But what has been the result? That there has been an expenditure of £4,500 for the completion of houses, a considerable portion of the expense of erecting which had been defrayed by the testator—I do not know how much, but it must have been considerable—and the only produce is £200 a year, including the value of the sites. I am told that this is a speculation which is likely to turn out profitable, but I deny the right of a trustee to speculate with the trust-money. Then I do not see how I could separate the part of this expenditure that was proper from that which was not, especially as it is not alleged that there was any *mala fides* in the dealings with the property. It can not be said that the property would have been valueless if this expenditure was not incurred. The plot was laid out, and might have been let or sold as building ground. Part has been so let.

I find that in *Dent v. Dent* a question was raised whether or not an inquiry should be directed in the first instance. The Master of the Rolls says, at page 368: "It, however, appeared to me that it was not a proper course to reserve the consideration of whether these sums ought or ought not to be allowed until after the parties had been put to a considerable expense in ascertaining the amount laid out, and the circumstances under which it had been done. I therefore thought it my duty to consider whether, if all the facts alleged were proved, I should allow the plaintiff any thing." In my opinion, no account would be useful. There is a question still, whether, even if I were to declare this expenditure a charge upon this property, the plaintiff could derive any benefit from it. There is a large number of unpaid creditors who have a right to be paid out of this property, if the general personal estate is not sufficient to pay

them, and it is not certain that the personal estate will be enough.

On all these grounds, I think that this bill must be dismissed; and as I do not see any reason for taking it out of the ordinary rule, I must dismiss it with costs. Bill dismissed with costs.

JAMES M'CORMICK, APPELLANT, v. WILLIAM GROGAN,
RESPONDENT.

[*Decided in the House of Lords, on Appeal, in 1869, Lord Chancellor HATHERLEY and Lord WESTBURY delivering opinions. Reported in 4 English and Irish Appeals, 82.*]

Will—Trust—C made a will leaving his whole property, real and personal, to G, whom he also appointed his executor. When about to die, C sent for G, and in a private interview, told him of the will, and on G's asking whether that was right, said he would not have it otherwise. C then told G where the will was to be found, and that with it would be found a letter. This was all that was known to have passed between the parties. The letter named a great many persons to whom C wished sums of money to be given and annuities to be paid; but it contained several expressions as to G carrying into effect the intentions of the testator as he "might think best," and this sentence, "I do not wish you to act strictly on the foregoing instructions, but leave it entirely to your own good judgment to do as you think I would, if living, and as the parties are deserving; and as it is not my wish that you should say any thing about this document, there can not be any fault found with you by any of the parties, should you not act in strict accordance with it." G paid money to some of the persons mentioned in the letter, but not to all. *Held*, that in this case there was not any trust created binding on G.

In this case the Court of Appeal in Chancery in Ireland (consisting of Lord Chancellor BREWSTER and Lord Justice CHRISTIAN), had reversed a decretal order of the Lord Chancellor BLACKBURNE, made under the following circumstances: Abraham Walker Craig, a linen merchant of Belfast, died on the 29th of September, 1854, unmarried, leaving several relatives, including his father and three brothers, him surviving. In July, 1851, he had made a will in these terms: "I devise and bequeath the whole of my property, both real and personal, to my most sincere and valued friend, Mr. William Grogan, of Wellington Place, Belfast, and appoint him my sole executor. In witness," etc.

In the evening of the 29th of September, 1854, the testator having been suddenly attacked with cholera (of which he died a few hours afterward), sent for Mr. Grogan, and communicated to him, in a private interview, the fact of having made the will long ago, leaving all his property to Mr. Grogan. The respondent (according to his evidence in the cause) asked the testator, "Is that right?" to which the testator answered, "It shall be no other way," and then told him that he would find the will in a desk, and a letter with it. No assent was asked from Mr. Grogan as to the contents of the letter. The testator died in a short time afterward, and a brother of his opened the desk, and there found an envelope addressed to himself in the handwriting of the deceased. The envelope had inside it these words: "My dear John, I request you will deliver to my sincere friend, Mr. Grogan, the inclosed in the event of my death. Yours sincerely, A. W. Craig, Falls Factory, 14th July, 1851." The envelope contained the will, and a letter in the following form:

"MY DEAR MR. GROGAN,—Seeing so much litigation and quarreling arise in consequence of property being left in many hands, to prevent same in my own case, I have thought it best to invest the whole of mine in your hands, as you will see by the inclosed will, and well knowing you will carry out my intentions to the best of your ability, I now state them. I leave to my beloved father £100 per annum during his life. To my sisters Mary Ann and Sarah, my beloved cousin Emily Benn, and my aunt Orr, and my much esteemed friend Miss Kitty Cochrane, £30 per annum each, during their lives. To my beloved cousins Mary Ann and Sarah Walker (daughters of my late uncle James), my esteemed relative Elizabeth Benn (daughter of my cousin James), my relative George Craig, of Ballymore, near Tandragee, my much esteemed friend Charles Woods, of Moygashel, my valued friend Robert M'Kinstry, £20 per annum each, during their lives. To my much esteemed friend Miss Allen, and her sisters Bess and Jane, Mrs. Alice McClelland, widow of my late friend Robert McClelland, of Banbridge, my present servant, Prudence M'Veigh, my late flax-buyer, James Sandford, of Tandragee, my present foreman hackler, James M'Cormick, my carpenter, Patt Gullery, my brother John's friends, George Gainford, Richard Gainford, and David Griffin, and to Mrs. Trainer, widow of my late foreman, Thomas Trainer, £10 per annum each, during their lives. To John O'Neill, one of my present loft-men, and to my man-servant, Robert M'Cann, £10 per annum each, during their lives, and at their deaths the same sums to their widows during their lives, should they, or either of them, survive their husbands. To my most esteemed Ann Alexander, widow of my late friend James Alexander, of Rosehill, £140 per annum during her life, and at her death to her four children forever, in the following proportions: if living, to her daughter Mary, £50 per annum, and to her three sons, Joseph, Samuel, and John, £30 per annum each; should any of them die before their mother and not have children, then the share of the deceased to go

to the survivors in equal proportions, or in whatever proportion you may consider them deserving of. After arranging for the due payment of the foregoing in whatever manner you may think best, I wish the remainder of my property to go to yourself and to my brothers Thomas, James, and John, in equal proportions, and to be sold or not as you may consider best for the benefit of all parties. I do not wish you to act strictly to the foregoing instructions, but leave it entirely to your own good judgment to do as you think I would, if living, and as the parties are deserving; and as it is not my wish that you should say any thing about this document, there can not be any fault found with you by any of the parties should you not act in strict accordance with it. I believe I have no other request to make, and the only excuse I can offer for imposing such trouble upon you is, that I would, if required, have undertaken a similar task for you. With best wishes for your happiness and all connected with you, believe me, your sincere friend,

A. W. CRAIG."

"There are a few friends which I have a sincere regard for, and which I would like to serve, if in my power, but did not include them in the foregoing, knowing many of them do not require and probably would not accept a gift from me; and, besides, I feel I might not be justified in making more bequests, lest the property should not turn out so as to leave a sufficient surplus after paying them, but give you the names of them below, and should any of them or their connections which you may consider worthy of assistance ever require the same, and that there is a large surplus left after paying the foregoing, I request you will set aside such a sum, before making any division with my brothers, as you may consider sufficient to meet any case or cases that may thereafter arise; but should there not be property sufficient after paying the foregoing to meet such cases, I have no doubt, if you will mention to my brother John my wishes, he will himself contribute, if in his power, to such cases when they occur. The names are as follows: James Bristow, William Valentine, Thomas Valentine, Daniel Foster, James Carson's family, children of my late friend Bryce Smyth, John T. Carter, Robert Brown, William Martin, James Scott, butter merchant, Thomas Geys Hadden, St. Rollox, Glasgow, Foster Connor, Mrs. F. Connor and all her sisters, children of my late friend Mr. Thomas Mackey, of Glenbank, Mrs. Knox, Mrs. Malcomson, and all my deserving relatives, but particularly my aunt and uncle Benn and their children.

"Having written the foregoing in a hasty manner, and perhaps in such a way as you may not clearly understand it, I leave it to yourself to carry out the intentions as you may think best, and should the property not yield sufficient at first to pay the annuities and leave a good surplus, you can defer as many of them as you find least deserving, and can best afford to wait until the outer park becomes more productive.

A. W. C."

The respondent, conceiving himself to be left, under the terms of the will, absolute master of the property, took out probate, and though never recognizing that any legal or equitable obligation was imposed on him by the letter, paid £5,000 to each of the three brothers of the testator, and other sums of money to other people, but did not pay the annuities of all the people mentioned in the letter, and among the rest he did not pay the

annuity to M'Cormick. A cause petition was presented by M'Cormick to have the trusts created by the letter as affecting the will, declared; and Lord Chancellor BLACKBURNE declared that the letter constituted a trust in favor of M'Cormick, and made an order accordingly. His decision was reversed in the Court of Appeal, Irish Law Reports (1 Equity), 313. This appeal was then brought.

Mr. *H. Law*, Q. C., of the Irish bar, and Mr. *Jessel*, Q. C., for the appellant. Sir *R. Palmer*, Q. C., Mr. *George A. C. May*, Q. C., of the Irish bar, and Mr. *A. M. Porter*, also of the Irish bar, appeared for the respondent, but were not called on to address the House.

The Lord Chancellor HATHERLEY gave a lengthened opinion, concluding that the judgment of the Court of Appeal in Ireland was correct, and should be affirmed by the House of Lords (*a*).

LORD WESTBURY: My Lords, I should not deem it necessary to add any thing to what has fallen from my noble and learned friend, were it not for the feeling of respect which I entertain for the able arguments of the counsel for the appellant.

My Lords, the jurisdiction which is invoked here by the appellant is founded altogether on personal fraud. It is a jurisdiction by which a court of equity, proceeding on the ground of fraud, converts the party who has committed it into a trustee for the party who is injured by that fraud. Now, being a jurisdiction founded on personal fraud, it is incumbent on the Court to see that a fraud, a *malus animus*, is proved by the clearest and most indisputable evidence. It is impossible to supply presumption in the place of proof, nor are you warranted in deriving those conclusions in the absence of direct proof, for the

(*a*) The opinion of Lord Chancellor HATHERLEY is quite lengthy, and enters into a careful examination of the testimony. Aside from this examination, the opinion of Lord WESTBURY gives all the points of law and equity made by the Lord Chancellor in a more brief and compact form. Inasmuch as the entire statement of facts is given, and because of the greater brevity of Lord WESTBURY's opinion, that of the Lord Chancellor is omitted, with the recommendation, however, that the learned reader will not omit an examination of the latter able opinion upon this very interesting rule of equity jurisprudence. See 6 English and Irish Appeals, 87.

purpose of affixing the criminal character of fraud, which you might by possibility derive in a case of simple contract. The Court of Equity has from a very early period, decided that even an act of Parliament shall not be used as an instrument of fraud; and if in the machinery of perpetrating a fraud an act of Parliament intervenes, the Court of Equity, it is true, does not set aside the act of Parliament, but it fastens on the individual who gets a title under that act, and imposes upon him a personal obligation, because he applies the act as an instrument for accomplishing a fraud. In this way the Court of Equity has dealt with the Statute of Frauds, and in this manner, also, it deals with the Statute of Wills. And if an individual on his death-bed, or at any other time, is persuaded by his heir-at-law, or his next of kin, to abstain from making a will, or if the same individual, having made a will, communicates the disposition to the person on the face of the will benefited by that disposition, but, at the same time, says to that individual that he has a purpose to answer which he has not expressed in the will, but which he depends on the donee to carry into effect, and the donee assents to it, either expressly or by any mode of action which the donee knows must give to the testator the impression and belief that he fully assents to the request, then, undoubtedly, the heir-at-law in the one case, and the donee in the other, will be converted into trustees, simply on the principle that an individual shall not be benefited by his own personal fraud. You are obliged, therefore, to show most clearly and distinctly that the person you wish to convert into a trustee acted *malo animo*. You must show distinctly that he knew that the testator or the intestate was beguiled and deceived by his conduct. If you are not in a condition to affirm that without any misgiving or possibility of mistake, you are not warranted in affixing on the individual the *delictum* of fraud, which you must do before you convert him into a trustee.

Now, are there any *indicia* of fraud in this case? The first thing which it is incumbent on the party to make out is, not only that the testator communicated to Mr. Grogan that the letter contained some directions touching the ownership of his property different from what appear on the face of the will, but you must also prove that the testator considered that Mr. Grogan

had accepted the obligation, and had made a promise to carry those different dispositions into effect. But when we examine the evidence, it amounts merely to this, that Mr. Grogan, like an honest man, at first expressed his surprise, and even remonstrated with the testator as to the disposition which he had made. The testator is not represented as telling Mr. Grogan, "That disposition is not the real one, the real disposition is contained in the letter;" but the testator asserts that he will have no other disposition made of his property; and the meaning of that is very clearly shown (as was observed by my noble and learned friend) when you connect the letter with the will, from which it is plain that the testator meant, "I will not have any other disposition than that; I place you in my shoes, and give you the absolute dominion over my property which I have myself, and leave you at liberty to carry out my present wishes, or not to carry them out, according to your discretion, which shall be absolute and uncontrolled." Even if that letter had been communicated to Mr. Grogan, there would have been no trust in favor of any individual. But there is nothing in the evidence that amounts to more than this, that the testator told him, "I will have my property disposed of in the way in which I tell you I have disposed of it by will, and you will find a letter in connection with my will." And when we come to the evidence, there is nothing to be extracted from that evidence that can be carried beyond this, that the individual to whom those words were addressed supposed, and naturally supposed, that the letter would have some connection with the property. My Lords, it is impossible to hold that that amounts to a distinct promise, the breach of which would constitute a fraud; for you can not constitute a fraud in this matter unless you find that there is a distinct and positive promise, the non-fulfillment of which brands the party with disgrace as having personally imposed on the testator. There is nothing, I repeat, in the circumstances of this case that would warrant us in arriving at that conclusion; and there is nothing, therefore, to justify the¹ appellant in coming here to fasten that personal imputation upon the respondent, and then to derive from that a conclusion of trust in favor of himself.

I am sorry that I am compelled to accede to the motion of my noble and learned friend, that this appeal should be dismissed

with costs; but it is absolutely necessary that it should be so, because it is a case where a right of property is claimed, and is sought to be enforced through the medium of fastening an imputation of fraud, for which there is no justification. Cases of that nature eminently deserve to be dismissed with costs, and such, I apprehend, will be the conclusion to which the House will come in this case.

Lord COLENSAY concurred.

Lord CAIRNS: My Lords, I entirely concur in the motion which has been made, and in the observations that have been made by those of your Lordships who have spoken.

Order affirmed, and appeal dismissed with costs.

RE HOARE'S TRUSTS.

[*Decided in the High Court of Chancery, in 1863, by Sir JOHN STUART, Vice-Chancellor. Reported in 4 Giffard's Ch. Rep. 254.*]

Where the draft of a supposed settlement in contemplation of the marriage of an infant ward of Court containing a covenant to settle after-acquired property, but no provision as to a second marriage, was approved by the intended husband but never executed, though a post-nuptial settlement in different terms was executed, the Court varied the latter settlement by adding the covenant as to after-acquired property.

By an order made on the application of Sir J. H. Lethbridge, the dividends of certain property bequeathed to his children were ordered to be paid to him for their maintenance and education during their minorities, or until further order. This order was relied on as constituting the children wards of Court. The share in the trust funds belonging to Julia, one of the infant daughters, consisted of 2,159*l.* 18*s.* 3*d.* bank annuities, and a small sum of cash.

On the 28th January, 1860, Major H. Walker, who was about to marry Miss Julia Lethbridge, at the request of Sir John Lethbridge wrote to his solicitors, begging that they would make arrangements for settling the money belonging to the lady

conjointly on her and himself. On the 21st February, 1860, a draft settlement containing the following covenant for the settlement of the lady's subsequently acquired property was sent to Major Walker: "And it is hereby agreed and declared that if the said Julia Decima Lethbridge now is, and if after this said intended coverture she or the said Hercules Walker in her right shall become seized, possessed, or entitled to any real or personal estate of the value of 200*l.* or upward for any estate or interest whatsoever," except jewels, etc., which it was thereby agreed and declared should belong to the said Julia D. Lethbridge for her separate use, "then and in every such case the said Hercules Walker and Julia Decima Lethbridge, and all other necessary parties, shall at the cost of the trust premises, as soon as circumstances will permit, and to the satisfaction of the trustees or trustee hereof, convey, assign, and assure the said real and personal property to, or otherwise cause the same to be invested in the said trustees or trustee hereof," upon the trusts therein declared.

On the 9th March, 1860, Major Walker returned the draft without having raised any objections. The marriage was solemnized from the house of Sir J. Lethbridge on the 15th March, 1860, with the consent of Sir J. Lethbridge, the young lady being then eighteen years of age, but no settlement was executed on that occasion. Shortly afterward, Major Walker requested the trustees to transfer the funds into his wife's name, but they refused on the ground that Sir J. Lethbridge had consented to the marriage on the faith of the settlement which had been approved. In the May subsequent the trustees paid the fund into court, under the provisions of the Trust Relief Act.

On the 7th February, 1861, a post-nuptial settlement of the sum of 2,159*l.* 18*s.* 3*d.* stock was executed by Major Walker. It contained the ordinary provisions for the settlement of personality on marriage, but made no provision for the children of Mrs. Walker by any future husband; neither did it contain a covenant by Major Walker to settle his wife's after-acquired property.

Major and Mrs. Walker and the trustees then presented a petition, praying for payment out of court to the trustees of the above sum of stock.

Upon that petition coming on, on the 1st March, 1861, an order was made directing the chief clerk to inquire whether any and what settlement of the fortune of the infant had been made, and if so, whether according to any and what ante-nuptial agreement for a settlement, and whether any and what further or other settlement ought to be made.

On the 10th July, 1862, the chief clerk certified that the post-nuptial settlement of the 7th February, 1861, had been executed by Major Walker and the trustees, which comprised the fund in court, and the other property of the lady, which was reversionary; that there had been no ante-nuptial agreement for a settlement; that Mrs. Walker was entitled to certain legacies, and to a sum of money as one of the next of kin of a lady deceased; and that "a further settlement ought to be made of the property comprised in the settlement of the 7th February, 1861, and of all other the real and personal property of or to which Mrs. Walker, at the time of her marriage, was seized, possessed, or entitled, and of any property, either real or personal, of which she, or Major Walker in her right, might, at any time during coverture, become seized, possessed, or entitled, of the value of 200*l.* or upward, and that such settlement should include therein the children of Mrs. Walker by any future husband, as well as the children of the existing marriage, and to be in such form as should be approved by the court."

Sir J. Lethbridge, who had liberty to attend the proceedings in chambers, now moved to vary the certificate, by striking out the words, "there was not any ante-nuptial agreement for a settlement," and substituting "there was an ante-nuptial agreement for settling all the property of the said Julia Decima Walker."

Major Walker and his wife also moved to vary the certificate by striking out that part of the certificate which found that a further settlement ought to be made of the wife's property, and substituting for those words that no further settlement ought to be made thereof.

Mr. *Craig* and Mr. *Hoare* appeared for the trustees. Mr. *Bacon* and Mr. *Springall Thompson*, for Sir J. Lethbridge.

The VICE-CHANCELLOR: As to the provision in the case of a second marriage, I do not think it can be maintained. The

marriage was contracted by the husband on the faith of the draft agreement, and by that he is bound, but no further.

This case comes within the principle laid down in *Long v. Long*, 2 S. & S. 119, by Sir JOHN LEACH, and in *Austen v. Halsey*, by Lord ELDON, and upon that principle the Court is bound to secure the interest of this lady.

In *Long v. Long*, the court went further than it is necessary to go in this case, because in this case the marriage having taken place on the faith of the settlement, which was prepared in draft and approved by the intended husband, it is not necessary that the Court should require any provision to be added to the settlement as to the children of a future marriage. In this respect, therefore, the settlement executed will not be varied. The order therefore will be made on the motion to vary the chief clerk's certificate.

The chief clerk was [not] right in finding that there was no agreement for a settlement, because the marriage took place after the draft settlement had been shown to the intended husband, and he raised no objection to it. Though, therefore, there is enough to bind him in the view of this Court to execute a settlement and to induce the Court to order him to do so, yet it would not be necessary to execute the settlement.

The costs of the trustee will come out of the funds, but no other order as to costs.

Ordered: That the chief clerk's certificate finding that there was no ante-nuptial settlement be varied and read as if the said certificate did not contain that finding; and on the motion of the petitioners to vary the certificate no order; and on the petition, on further consideration, this Court doth order that a covenant be indorsed on the settlement as follows: The within-named Hercules Walker, for himself, his heirs, executors, and assigns, doth hereby covenant, promise, and agree with the said W. Walker [the trustees] that if the said J. D. Walker was at any time of her marriage, or the said H. Walker in her right, shall have become seized, possessed of, or entitled to any real or personal property of the value of 200*l.* or upward, or for any estate or interest whatever, except jewels, trinkets, ornaments, plate, pictures, books, prints, and other articles of a like nature, which it is hereby declared shall belong to the said J. D. Walker for

her separate use, then and in every such case the said H. Walker and J. D. his wife, and all other necessary parties, if any, shall at the cost of the within-mentioned trust funds, as soon as circumstances will permit, and to the satisfaction of trustees or trustee, convey, assign, and assure the said real or personal property, or cause the same to be vested in the trustees or trustee of within-mentioned trust funds upon the trusts within declared of the matters within assigned. And it is ordered, the covenant so to be indorsed, be executed by the said Hercules Walker (a).

WILLIAM C. WILLIAMS, SR., v. WILLIAM C. WILLIAMS, JR.

[Decided at the Summer term, 1871, of the Court of Appeals of Kentucky, composed of WILLIAM S. PRYOR, Chief Justice, and BELVARD J. PETERS, WILLIAM LINDSAY, and MORDECAI R. HARDIN, Justices. Reported in 8 Bush, 241.]

A trust was created by purchasing land at execution sales upon a verbal agreement between the owner and the purchaser that the purchaser would hold the land as security for the money advanced and interest, and that the owner should have the right to redeem.

Acquiring and holding the legal title to land by purchasing at execution sales and otherwise, under a verbal agreement between the owner of the land and the purchaser that the land and title should be held as a security for moneys advanced and interest thereon, and that the owner should have the right to redeem the land, created a trust which is enforced.

In this case the purchaser held the legal title to the land about fifteen years before the suit was brought, in which the trust was established and enforced against him, on his verbal agreement to hold the land and permit its redemption, etc. See opinion for a full statement of the facts and evidence establishing the trust.

(a) In *Prideaux v. Lonsdale*, 4 Giffard's Ch. Rep. 159, a settlement made by a woman of her personal property after her engagement to be married, was set aside at the suit of the husband, although he was told before the marriage that she had executed a settlement affecting her property. It appearing that neither she herself or her husband was accurately informed of the nature and effect of the trusts of the settlement: Held, that the doctrine of constructive notice of the contents of an instrument was not sufficient to bind the husband on the ground of acquiescence. Suppression of the truth, or misrepresentation of a material fact, will vitiate any contract or gift, the validity of which depends upon the truth and accuracy of the representation on which it was made.

Time for redeeming land sold under execution being extended beyond one year by the purchaser, he is entitled to ten per cent interest per annum for one year only. In such case interest should be calculated at the rate of ten per cent per annum for one year, and after adding that to the principal, interest should be calculated thereafter at the rate of six per cent per annum.

APPEAL FROM THE LOUISVILLE CHANCERY COURT.

Barret & Roberts, James Harlan, and Barr & Goodloe, for appellant. *John M. Harlan and L. A. Wood*, for appellee.

CHIEF JUSTICE PRYOR delivered the opinion of the Court: W. C. Williams, Jr., was the owner by devise from his father, Daniel Williams, of a tract of thirty-three and one-third acres of land adjacent to the corporate limits of the city of Louisville. On the 15th of July, 1855, this land was sold under an execution from the Jefferson Circuit Court in favor of the Louisville and Shepherdsville Plank-road Company against the said Williams for the sum of \$654.31, and purchased by Levi Tyler as the agent of the company.

In June, 1855, an execution issued upon a judgment from the same court in favor of James Brown against Williams for \$309, and this execution was replevied by Williams, with the appellant, W. C. Williams, Sr., and David Meriwether, as his sureties on the replevin-bond. An execution afterward issued on this replevin-bond, and on the 4th of February, 1856, the appellee's equity of redemption in this land was sold, the plaintiff, Brown, becoming the purchaser thereof for \$361.48.

On the 15th of July, 1856, Brown assigned to Williams, Sr., and David Meriwether, the benefit of his purchase, including all his title and interest acquired under it. Tyler, who had made the purchase under the first execution, also assigned to these same parties, Meriwether and Williams, Sr., all the right, title, and interest acquired in the lands by reason of his purchase. By the will of Daniel Williams the devise of this land, or the land itself, was charged with the payment of certain sums of money devised to the brothers and sisters of the appellee. White and wife, who were interested in this lien created by the will, obtained a judgment in the Louisville Chancery Court against the appellee, enforcing a part of their lien, and in June, 1858, two acres of this tract of land was sold to satisfy this judgment,

amounting to —, and David Meriwether became the purchaser at —, and gave bond, with Williams, Sr., his surety.

In October, 1860, Meriwether, by a conveyance without warranty, sold all his interest in this land to the appellant, W. C. Williams, Sr., for the sum of \$420.

In September, 1861, White and wife had another judgment to enforce their lien, yet unpaid, and on the 17th of March, 1862, there was a sale under this judgment, and W. C. Williams, Sr., became the purchaser for the sum of \$1,254.94.

After the assignment by Brown and Tyler to Meriwether and Williams, Sr., of the executions under which the land was first sold, the deputy sheriff, on the 17th of November, 1856, made them a deed for this land, and the commissioner in a few days after his sale, under the last judgment of White and wife, made to Williams, Sr., a deed to this land also by reason of that purchase; and Meriwether having conveyed to him the interest he had acquired, Williams, Sr., thus became invested with the legal title to the whole tract.

The appellee, W. C. Williams, Jr., on the 4th of January, 1870, filed this suit in the Louisville Chancery Court, in which he alleges that the transactions between Brown and Tyler on the one side, and Meriwether and the appellant on the other, resulting in the transfer to them of these executions and the sales under them, were all for his benefit, under an agreement made to that effect; that each and every purchase made by them was under a like agreement and trust, with the right of the appellee to redeem the property, and that the appellant held it merely as security for the repayment of moneys advanced by him; that the deeds were made by the sheriff and commissioner to this land without his knowledge or consent; that the appellant never set up any claim to the land otherwise than as stated, until August, 1869, at which time he claimed the property absolutely, and is now fraudulently withholding the title. He also claims a large sum of money for services rendered the appellant in renting out his (appellant's) property, and in attending to his business generally; that the value of these services amounts to a sum more than sufficient to repay the appellant all the moneys advanced for him.

The appellant in his answer denies any agreement to hold

this property in trust for the appellee, and insists that he bought the property for his own purposes, and that all the purchases made by him were absolute and unconditional; that he regarded the purchase as a bargain, and it was always his intention to give the plaintiff a part of it, simply as a gratuity, and that he had in fact directed him to fence off twenty acres of the land. He also relies upon the statute of frauds, etc. It will be unnecessary to recite in detail the mass of testimony in this large record, adduced by each party upon the questions involved.

It seems that Williams, Jr., about the time his property was sold under the execution in favor of Brown and Tyler, had been unfortunate in his domestic relations, and a suit was then pending in the Louisville Chancery Court against him by his wife for a divorce and alimony. His cousin, Williams, Sr., was his friend and confidential adviser during the litigation with his wife; and in fact seems by his advice to the appellee to have induced him to abandon the management of the defense and intrust it almost altogether to the appellant. While this suit was pending, and shortly after the sale of appellee's land under the execution of Brown and Tyler, the appellant had an interview by previous arrangement with the appellee at the law-office of Rousseau, in Louisville, for the purpose of devising some means to relieve the appellee from his pecuniary embarrassments, and to aid him in the suit then pending against him by his wife. This interview was private, and not in the presence of the attorney, and all he knows in regard to it is that when it terminated, and the parties were about to leave, they told him that the arrangement had been agreed upon between them, but did not state its terms. This meeting, in the language of the witness Rousseau, was to assist him, either "*by advancing him money, or in aiding him to obtain it from others.*"

Shortly after this interview, the money was paid by Meriwether and Williams, Sr., to the purchasers under the execution, and the bids transferred to them. Meriwether in his deposition in the divorce case, although claiming to have made an absolute purchase of the land, says, in speaking of that purchase and the time at which the right to redeem expired, "that the fellow was about *losing his land, and the transfers were made to us,*" meaning himself and the appellant.

In 1856, when the first sales were made of this land under execution, it was worth from ten to fifteen thousand dollars, and in the year 1860, when Meriwether conveyed his interest in the land to the appellant, it was worth fifteen or twenty thousand dollars. The interest of Meriwether at this time in the land, if owned by him as alleged, was worth not less than eight thousand dollars; and it is difficult to conceive why he would thus dispose of such valuable property, adjacent to the growing and prosperous city of Louisville, increasing in value greatly every year, to the appellant for the nominal consideration of four hundred and twenty dollars. The appellant was himself wealthy, and had no claims upon the generosity of Meriwether.

The only reasonable solution of his conduct is that he, together with the appellant, was then holding the property as the security only of the money advanced by them to redeem it. Meriwether after he became interested in the executions, and before he sold to W. C. Williams, Sr., stated to his son "that he had met Williams, Jr., who told him that the time for redeeming the land expired on that day, and he had no money; that he (Meriwether) regarded it as valuable land, and that it came near being sacrificed at a mere song; that himself and W. C. Williams stepped forward and paid it off." In a subsequent conversation he stated "that he (Meriwether) was hard pressed for money, and that he would have to transfer to W. C. Williams his interest in the land, and Mrs. Meriwether, his wife, then asked her husband if Williams, Jr. (the appellee), had been protected, and he replied that the property was worth some fifteen or twenty thousand dollars, and that the understanding was between him and Williams, Sr., that whenever the appellee would pay off the debt and interest he might have the property back."

In addition to all this, both Meriwether and the appellant were witnesses in the divorce suit between appellee and his wife; they knew of her claim for alimony, and that the land was being valued as a part of appellee's estate. They had purchased this land under execution levied before the institution of the suit, and never during the progress of that tedious litigation asserted any right or title to the property; but, on the contrary, their claims were reported merely as moneys advanced for the appellee,

showing his entire indebtedness in order to regulate the allowance for alimony. Both Meriwether and Williams, Sr., had interested themselves in this suit, and Williams, Sr., no doubt consulted the lawyers of his cousin (Williams, Jr.) oftener than the latter himself did in regard to it.

These facts, connected with the confidential relations existing between these parties, and the great inadequacy of price paid by them for this land they claim to have bought unconditionally, forces the mind to the conclusion that Meriwether and appellant were, up to the time of the sale by Meriwether to the appellant, holding this land as a security only for the repayment of the moneys advanced by them for the appellee, and this conclusion is strengthened by the acts and declarations of the appellant in regard to this land after his purchase from Meriwether. After the conveyance by Meriwether to appellant of his interest, we find the appellant with the legal title to this land, worth from twenty to thirty thousand dollars, at a cost to him of less than three thousand dollars. The conveyances made of this land by the sheriff and commissioner to the appellant were made, so far as the proof shows, without the knowledge of the appellee; but that in a short time afterward he knew that they had been thus made, is clearly established.

In July, 1860, the appellant addressed a letter to the appellee. He says that his mind had "been called to the business matters between himself and appellee; that his object in aiding him was to extricate him (appellee) from the meshes he had fallen into by reason of his unfortunate marriage," and adds: "I want you to be a free man, and the only way I see on earth is for you to dispose of some of your property; and I would say to you, avoid the eating moth of interest. I am disposed to take your lots at a fair cash value, in order that we may bring matters to a close. As I consider it improvident to have things in a loose and unsettled state, I want you to see the most you can get between this and Saturday, and we can confer," etc.

It seems the appellee had made a division of this land into six five-acre lots, and had employed C. Green, an auctioneer, to sell them at public auction; the property was advertised by Green, giving the locality of the land and the terms of sale. This witness says that after he had advertised the lots he met

the appellant in Louisville, and spoke to him of the intended sale, and the appellant then remarked that *he* (appellant) *would have* to make the deeds to the purchasers; that he was holding the property for appellee, and would make the deeds when the sale was over. This was in the year 1860. The price offered for these lots was not deemed sufficient, and the property was withdrawn from the market. Here was a plain and unmistakable recognition of the appellant's right to the property by agreeing to make the deeds to the purchasers, and in fact by letter offering to buy the property himself.

In 1869, the appellee again employed a real estate agent to sell this property, and this agent made a contract with a man by the name of James, by which he agreed to take twelve acres of the land at two thousand two hundred and fifty dollars per acre. The appellant read the contract between the parties, assented to the sale, and agreed to make the deed. This sale was not perfected, and the reason was, that the appellant refused to surrender his title unless he was paid five thousand dollars.

The declaration was made time and again by the appellant, from the years 1856 up to 1869, that this land belonged to the appellee, and that he was holding it for him. The letters of appellant to appellee, while in Missouri, and before Meriwether sold his interest, all tend to show that the land was regarded by appellant as appellee's property. It is true that the appellant listed the property for taxation, and that it was leased by himself and Meriwether for several years; still in all this leasing the appellee *seems* to have had some connection with the property; he was the only person ever seen or known upon the farm by the tenants, repairing and looking to its cultivation, and seemed to be so much interested in it as to induce one of the tenants, Oldham, to ask him if he owned it. The appellee attested one of the leases, and was perhaps called on as a witness in regard to it, but was not examined. In the preparation of the pleadings in a suit against one of the tenants for waste and rents, the appellant directed the lawyer to advise with the appellee, in order to the proper understanding of the case; and although he said to the lawyer that it was the old man's property, still we find the appellant directing the officer who had collected the

rent under a distress warrant to pay it over to the appellee, as it was appellee's land. The appellee, during the whole period between the years 1855 and 1869, except while he was in Missouri, seemed to be always present when leases were executed, and invariably attending to the interests and repairs on the land; and the proof of appellant, when taken in connection with the proof of appellee, rather increases than lessens the force of appellee's testimony. Why it was the title was held in the appellant so long, is a question not easily answered. The appellant may have supposed that, with the legal title to the property vested in him, it would be safe from the improvident management of the appellee. It is certain, however, that during this whole period there was a continued recognition by appellant of the appellee's right to the property (a).

We have been unable to perceive how the wife was defrauded by this mode of holding the title to the land. There was no effort to set up any adverse title to the property so as to defeat the wife's claim for alimony; but, on the contrary, it was acknowledged to belong to the appellee, and the moneys that had been advanced for him listed in that suit as a part of his indebtedness.

There are many facts in the record that do not speak well for the appellee; but no such state of case is presented as would authorize this Court to divest him of this valuable estate upon a consideration so grossly inadequate, and having its inception from his unfortunate troubles and pressing necessities for money.

The counsel for appellant, in a very able and elaborate brief, insists that although the facts proven by appellant may be regarded as uncontroverted, still the statute of frauds precludes his right of recovery, as the alleged agreement is not in writing (b). The facts show that this was not a sale of any lands to the appellee by appellant, but a mere holding of the legal title obtained upon a promise made to extend the time for

(a) See *Wedderburn v. Wedderburn*, preceding, page 348, as to the time within which accounts may be taken between trustee and *cestui que trust*.

(b) The references are to the Revised Statutes of Kentucky, 1 Stanton, 484, 485; 2 Ib. 230.

redeeming the plaintiff's property, and as a security for the moneys they had advanced for him.

In the case of *Griffin and wife v. Coffey*, 9 B. Monroe, 452, the dower interest of Griffin's wife in a house and lot was sold under execution by the sheriff, and purchased by Gann. The sheriff conveyed the property to Gann; but, being subject under the law to redemption, Gann sold and conveyed it to Coffey. Griffin and wife filed their bill in this case alleging that Coffey redeemed the property for them, and took a conveyance at their request, and was to hold the land for indemnity. Coffey denied the trust, and claimed the property as his own. The allegations of Griffin and wife were sustained by the proof, and the court held in this case "that it was not a purchase by Coffey from Gann, the legal title-holder, but it was a pledge by Griffin and wife to Coffey of their equity of redemption until Coffey was repaid, and a mere extension of the time for redemption, which could be done by the verbal agreement of the parties."

In the case of *Martin v. Martin*, 16 B. Monroe, 8, the commissioner of the Anderson Circuit Court sold a tract of land belonging to Josiah Martin to satisfy a judgment in behalf of Lancaster and others. Draffin bought the land for Josiah Martin, as he informed him after the sale, to prevent a sacrifice of his property. Draffin afterward transferred the benefit of his purchase to E. Martin, with the agreement that he was to take Draffin's place in the purchase, pay the money bid by him for the land, and when his brother paid him he was to have the land back. After this transfer by Draffin, E. Martin procured an order for a conveyance of the land to himself. Josiah Martin, upon this state of case, brought his suit to cancel the deed and have the possession of the land surrendered to him. It was held "that, although the agreement was in parol, it was a trust that the purchaser could not refuse to perform," and relief was granted.

In the case of *Miller's heirs v. Antle*, 2 Bush, 408, Miller purchased under a decretal sale, at much less than its value, Antle's land, containing two hundred and seventeen acres. By an agreement in parol between Miller and Antle before the purchase, Antle was to have one hundred and seventeen acres of this land on payments. Miller, after his purchase, lived on the one hundred acres, and Antle retained his one hundred and

seventeen acres. Miller died, having received before his death fourteen hundred dollars of the money from Antle. Miller had also obtained a deed from the commissioner for the whole land. In this case, upon a petition filed by Antle, it was adjudged that he was entitled to the land.

In the case of *Green v. Ball*, 4 Bush, 586, Mitchell purchased the land at a sale by the commissioner, and agreed verbally with Green, the owner, that he would become the purchaser to prevent a sacrifice, and that all legal and equitable rights that he might then acquire should operate only as a mortgage to secure him in the repayment of the moneys advanced. Mitchell afterward obtained a conveyance of the land, and sold and conveyed it to Ball, who had notice of the parol agreement between Mitchell and Green. The court held that such a parol contract was not within the statute of frauds, and granted the owner relief as against the last purchaser.

The numerous authorities referred to by counsel for the appellant are not in conflict with the authorities already referred to. In our opinion, this was a trust that might have been enforced as against either Meriwether or the appellant, and that they obtained the deeds and held the property merely to secure them in the moneys they had advanced for the appellee, and that such was the understanding and agreement of all the parties.

In the case of *Thomas v. M'Cormick*, 9 Dana, 108, the court says that there can be no doubt that M'Cormick understood and intended that the conveyance should be absolute on its face, and then decides that parol testimony can not be admitted in opposition to the legal import of the deed unless upon an allegation of fraud or mistake or vice in the consideration.

We can not perceive how that principle is to be made applicable to the present case. Here no sale was made as between the parties, but a mere holding by the appellant by reason of the transfer of the executions under which the land had been sold, to enable the appellee to redeem it, and to secure the appellant in the moneys he had advanced for him. It might well be argued that the manner in which the deeds were procured by appellant was a fraud upon the appellee; their execution, however, to appellant can not affect the rights of the appellee under the facts of this case.

The judgment of the court below, permitting the appellee to redeem the land, was proper, and is now affirmed. The commissioner's report, however, is defective, and the exceptions filed by appellant as to the claim of appellee for services should have been sustained. There is no reason why the statute of limitations is not a bar to appellee's claim for services. There was no trust created in any way by the employment of appellee to rent appellant's lands. It is like any other claim for work and labor or services performed, and his claim, existing for a longer period than five years previous to this suit, should have been rejected. The testimony of the witness, Corcoran, in regard to the acknowledgment of the claim of appellee for services by appellant, is not deemed sufficient to take the case out of the statute. His whole testimony impresses the mind with the belief that he is very favorable, to say the least of it, to appellee in this controversy, and his statements as to this acknowledgment is inconsistent with other facts in this record bearing upon the same point. The appellant, according to this statement of Corcoran, is presented with this large account, amounting to five thousand five hundred dollars for eleven years' services, and with scarcely time to look at it pronounces it all right. This account charges five hundred dollars per year for the services, when the proof shows that he was only to have ten per cent on the amount collected; and, in addition to all this, it is not to be presumed that he would collect this money during a period of eleven years, in pressing need of money himself, and never retain one dollar for his services. Three hundred dollars per annum is as much as the appellee is entitled to for his services for the five years next preceding the institution of this suit.

The commissioner erred in allowing the appellant ten per cent interest on the amount of the executions under which this property was sold for a longer period than one year. He should calculate interest for one year at ten per cent, and after adding principal and interest together calculate interest upon the result at six per cent.

The commissioner's report should be made to conform to this opinion; and for the balance due appellant, if not paid, the land or a sufficiency thereof should be sold. Upon the

payment of the money, the appellant should be required to convey to appellee the land.

The judgment is reversed on the original appeal, so far as it is adjudged that appellee shall recover of the appellant \$404.52 with interest, and affirmed on cross-appeal. The cause is remanded for further proceedings in conformity with this opinion.

ROACH v. HUDSON.

[Decided at the Summer term, 1871, of the Court of Appeals of Kentucky, Judge M. R. HARDIN delivering the opinion. Reported in 8 Bush, 410.]

Purchaser at decretal sale induced persons not to bid against him by giving assurance that on the return of the absent owner, he would let him repurchase the property at the inadequate price given by the purchaser. *Held*, that if the absent owner, on returning home, had sought or required, within a reasonable time, a resale of the property to him in compliance with the assurance given at the sale by the purchaser, and the latter had refused compliance, the Court would regard him as having held the property in trust, and liable to account for the difference between the price paid and the amount for which he afterward sold the property.

But in this case the purchaser was absolved from the trust. It was made to appear that after the original owner's return, the purchaser, in good faith, offered to let him repurchase the property by paying only what it had cost, including improvements, and not objecting to the proposition as unfair, or variant from the assurance given when the purchase was made, the original owner declined the privilege of repurchasing: *Held*, that by thus declining to repurchase, the original owner absolved the purchaser from any trust or liability which devolved on him by his promise or assurance made at the sale, and waived his right thereafter to demand a compliance therewith, and left the purchaser free to keep or dispose of the property as his own without responsibility to the original owner.

APPEAL FROM GREEN CIRCUIT COURT.

John W. Lewis, Garnett & Baker, and John Rodman, for appellant. A. J. James and Daniel James, for appellee.

JUDGE HARDIN delivered the opinion of the Court: Under a judgment of the Green Circuit Court in favor of W. B. Patrick against the appellee, Drury Hudson, a house and some lots of the latter in the town of Greensburg were sold by a commissioner on the 21st day of July, 1862, and purchased by the

appellant, J. J. Roach, at the price of \$704, Hudson being at the time absent from this state, and within the military lines of the Confederate States.

It appears that at the sale the appellant induced at least one friend of Hudson to cease to bid against him, by giving an assurance that on the return of Hudson to Kentucky, he would let him repurchase the property at the price given by the appellant; but whether he waived the right to improve the property, and required pay for improvements also in the event of a resale, there is a contrariety of evidence. The evidence is also conflicting as to the real value of the property at the time, but the conclusion is authorized that the price given was to some extent inadequate; and but for the assurance given by the appellant as aforesaid, a relative of the appellee would have bid the property up even to fifteen hundred dollars, or purchased it for his benefit.

It also appears that, after improving the property to the amount of \$350, the appellant, on the 20th day of November, 1866, sold it to Dodd for \$1,825.

This suit was prosecuted by the appellee to recover of the appellant the difference between the cost of the property and improvements and the price at which he sold it; and the Circuit Court having rendered a judgment for the plaintiff on that basis, the defendant has appealed to this Court.

If the appellee, on returning to his home, had sought or required, within a reasonable time, a resale of the property to him, in compliance with the assurance given by the appellant at the sale, and the latter had refused compliance, we would regard him as having held the property in trust for the appellee, and concur in the conclusion of the Circuit Court that he should account for the excess of the price he received over the cost of the property to him.

But it satisfactorily appears from the testimony of the witnesses, White, Mrs. Durham, and Mrs. Mason, uncontradicted and unimpeached, that the appellant, after the appellee's return to Kentucky in 1865, offered in good faith to let him repurchase the property by paying only what it had cost the appellant, including improvements, and that the appellee, not objecting to the proposition as unfair or variant from the assurance given by

the appellant when he purchased the property, declined to avail himself of the privilege of repurchasing.

This, in our opinion, absolved the appellant from any trust or liability devolved on him by his promise or assurance made at the sale as aforesaid, and waived the right of the appellee to demand a compliance therewith, and left the appellant free to keep or dispose of the property as his own, without responsibility to the appellee.

Wherefore the judgment is reversed, and the cause remanded with directions to dismiss the petition (a).

HONORE v. HUTCHINGS.

[*Decided at the Winter term, 1871, of the Court of Appeals, in Kentucky, Judge WM. LINDSAY delivering the opinion of the Court. Reported in 8 Bush, 687.*]

A resulting trust and pledge or mortgage not a conditional sale.—Hutchings and Honore, in 1861, jointly purchased thirty acres of land near Chicago, Ill. Hutchings advanced the entire purchase-price, took a conveyance to himself, and executed a writing in which, among other things, "it is agreed between said parties that when said land is sold, said Hutchings is to have first his six thousand dollars so advanced, and ten per cent interest, and the profits over and above said sum are to be equally divided between said parties. . . . This arrangement is to continue eighteen months, when, if the property has not been sold, said Honore is to pay one-half the sum so advanced, with the accrued interest, or said Hutchings is to be the sole owner of the same." The land was not sold within the eighteen months, and Honore failed to pay any part of the sum so advanced. In 1869, Hutchings sold the land for one hundred thousand dollars, and refused to pay any part thereof to Honore. Honore sued Hutchings for one-half of the net profits, after deducting purchase-price, interest, etc.: *Held*, that a trust resulted in favor of Honore to the extent of one-half of the land jointly purchased. This interest he pledged to Hutchings to secure the repayment to him of one-half the purchase-price advanced, etc.; and Hutchings held the legal title to one-half of the land in trust for Honore, and the latter is entitled to one-half of the net profits realized upon the resale of the same.

(a) See the preceding cases of *Follansbe v. Kilbreth*, page 180, and *Wade v. Pettibone*, page 190, to the same point. Also, *Hoffman Coal Co. v. Cumberland Coal Co.*, page 87, and notes on pp. 38, 72, 98.

The conveyance to Hutchings and the condition of defeasance executed by him to Honore must be construed together, as though the one was incorporated into the other. (Powell on Mortgages, 67.)

When so construed, it appears that the one took an absolute title to the joint property of both, having first executed and delivered to the other a condition of defeasance. In such a case the onus devolves on the party who insists that the contract was a conditional sale. (*Edrington v. Harper*, 3 J. J. Marshall, 356.)

The contracts show upon their face that Hutchings took the title to secure the payment of the money and the interest that might accrue upon the same. Such an arrangement is perfectly consistent with the idea of a mortgage, and though it may be doubted as to whether or not the absolute conveyance to Hutchings was intended to operate only as such, yet the rule is that in all doubtful cases the law will construe a contract to be a mortgage, because such a construction will be most apt to attain the ends of justice and prevent fraud and oppression. (*Skinner v. Miller*, 5 Littell, 86.)

Distinction between a mortgage and a conditional sale.—Where the debt forming the consideration of the conveyance still subsists, or the money is advanced by way of loan, with a personal liability on the part of the borrower to repay it, and by the terms of the agreement the land is to be reconveyed on payment of the money, it will be regarded as a mortgage; but where the relation of debtor and creditor is extinguished or never existed, there a similar agreement will be considered as merely a conditional sale. (2 Greenleaf's Cruise, note 1, page 74.)

The common law will be presumed to be in force in the state of Illinois, where the entire transaction in this case took place, as there is nothing in the record showing the contrary.

APPEAL FROM THE LOUISVILLE CHANCERY COURT.

Barret & Roberts and *W. P. D. Bush*, for appellant. *E. Harris, E. S. Worthington, I. & J. Caldwell*, and *J. F. & T. W. Bullitt*, for appellee.

JUDGE LINDSAY delivered the opinion of the Court: H. H. Honore, who was a real estate agent in the city of Chicago, Illinois, and Eusebius Hutchings, a citizen of Louisville, Kentucky, having negotiated with one Tiernan for the purchase of an undivided moiety of a tract of sixty acres of land situated near the city of Chicago, agreed that the title to the same should be conveyed to Hutchings for the reasons and purposes set out in a paper executed and delivered by Hutchings to Honore on the 18th day of November, 1861. Said paper is in the following words:

"Mr. E. Hutchings has this 18th day of November, 1861, bought jointly with H. H. Honore the undivided half of sixty acres of land in section 13, township 39,

range 13, from Mr. Tiernan, for the sum of six thousand dollars, the whole of which sum the said Hutchings is to pay, and takes the title and control of the property *to secure himself for said sum of six thousand dollars and ten per cent interest that may accrue upon the same until the land is sold.*

"It is agreed between said parties that when said land is sold, said Hutchings is to have first his six thousand dollars *so advanced, and ten per cent interest*, and the profits over and above said sum are to be divided equally between said parties. The parties are to pay equally the taxes or any assessments that may be levied upon said land, and the parties propose to sell said land when a satisfactory price to said Hutchings can be obtained. This arrangement is to be continued eighteen months, when, if the property has not been sold, said Honore *is to pay one-half the sum so advanced, with the accrued interest*, or said Hutchings is to be the sole owner of the same.

[Signed,]

E. HUTCHINGS."

The evidence in the case conduces to show that the land was bought upon very favorable terms, and that the parties making the purchase had every reason to believe that a great speculation had been secured. It can not be doubted but that it was through the exertions and superior information of Honore that the investment, which eventually turned out even more profitable than could reasonably have been expected by either party, was made. During the first two or three years after the purchase, lands in the vicinity of Chicago did not advance in value as rapidly as had been anticipated, and no sale was made within the stipulated time. Honore, who appears to have been greatly embarrassed, failed to pay one-half of the purchase-price and the accrued interest thereon, as he had agreed to do, and Hutchings insists that by reason of such failure he forfeited the interest secured to him in the purchase by the writing before set out; and when Honore applied to him, some time after the expiration of the eighteen months, for an extension of time within which to make the agreed payment, he declined to accede to the proposal, and claimed that he was then the sole owner of the land.

In pursuance to the written agreement, Hutchings, on the 31st day of December, 1861, caused the land to be conveyed to himself. In February, 1869, he sold it for one hundred thousand dollars in currency.

Honore instituted this suit against him, claiming that under the terms of their purchase he was *a joint owner* with him in the land purchased, and entitled to one-half of the net profits realized in the speculation. His petition was dismissed, and he has appealed to this Court.

The legal title to the land having been conveyed to Hutchings, the first question to be determined is, whether or not the written agreement executed by him to Honore so far modified the legal effect of this conveyance, made with the knowledge and consent of the latter, as to raise by implication of law a trust in his favor to the extent of one-half of the land. The entire transaction took place in the state of Illinois, and as there is nothing in the record showing the contrary, we must presume that the common law is in force in that state.

By the common law, implied trusts are generally raised upon the supposed intention of the parties, as gathered from their language and conduct, or from the nature of the transaction between them. If the conveyance be made to one person and the purchase-money paid by another, a trust results by implication of law in favor of the person who pays the money. So likewise, if the conveyance be made to one and the purchase-price paid in part by another, a resulting trust is raised in favor of the latter to the extent of such payment. In this instance, however, it is insisted that no part of the purchase-money was paid by the appellant, and that he does not come within the reason of either of the foregoing equitable rules. But it is equally well established that if a joint purchase be made in the name of one party, and the other *secures to be paid* his share of the purchase-price, he will be entitled to his proportion of the property purchased as a resulting trust, *Wray v. Steele*, 2 Ves. & Bea. 388; *Tiffany and Bullard on Trusts and Trustees*, 97.

In the case of *Boyd v. M'Clain*, 1 Johns. Ch. 582, Chancellor KENT goes even further than this. In that case, the party to whom the conveyance was made paid the entire purchase-price, yet the chancellor permitted the fact to be established by oral testimony that he took the title to secure the repayment of the same, it having been loaned to the real purchaser, and held that a trust resulted in favor of the latter by implication of law. In this case we have written evidence that Hutchings bought the land jointly with Honore; that Honore *secured to be paid* his share of the six thousand dollars, the purchase-price, and ten per cent interest thereon, which sum had been *advanced* by Hutchings on the joint purchase of himself and Honore; that the parties were to share equally the profits realized on the

resale of the land, and to bear equally the taxes and assessments that might be levied against the same, and that when sold it was to be sold by "the parties," are circumstances which of themselves are sufficient to establish the joint ownership of the litigants, even if Hutchings had not over his own signature stated that such was the fact.

It therefore becomes necessary to determine the legal effect of the condition of forfeiture contained in the writing upon which Honore relies to support his claim to one-half of the net profits realized from the speculation. It was agreed that in case the land was not sold at the end of eighteen months, he was to pay one-half of the sum advanced, with the accrued interest, or Hutchings was to be the sole owner of the land.

If it can be gathered from this that Honore took no vested interest in the land under the purchase from Tiernan, but was merely the agent of Hutchings to sell, and was to receive one-half of the net profits as compensation for his services in making the sale, then it follows that the contract between the parties was in the nature of a conditional sale from Hutchings to Honore, and as time is of the essence of such contracts, the failure of Honore to make prompt payment of the stipulated amount puts it out of the power of a court of equity to afford him relief. But to give such a construction to this latter clause not only makes it repugnant to the remainder of the agreement, but makes it override and nullify every other stipulation or provision contained in the entire writing.

As we have before stated, a trust resulted in favor of Honore to the extent of one-half of the land jointly purchased. This interest he pledged to Hutchings to secure the repayment to him of one-half of the purchase-price advanced. In pursuance to their agreement Hutchings took the title to the land, and was allowed to control the same. But the conveyance of Tiernan, and the writing executed by Hutchings, constitute in law but one instrument, and must be construed together as though the one was incorporated into the other, *Powell on Mortgages*, 67. When so construed, it appears that the one took an absolute title to the joint property of both, having first executed and delivered to the other a condition of defeasance. In such a case the onus devolves on the party who insists that the con-

tract was a conditional sale, *Edrington v. Harper*, 3 J. J. Marshall, 356.

The contracts show upon their face that Hutchings took the title to secure the payment of the money and the interest that might accrue upon the same. Such an arrangement is perfectly consistent with the idea of a mortgage, and though we may doubt as to whether or not the absolute conveyance to Hutchings was intended to operate only as such, yet the rule is that "in all doubtful cases the law will construe a contract to be a mortgage, because such a construction will be most apt to attain the ends of justice and prevent fraud and oppression," *Skinner v. Miller*, 5 Littell, 86 (a).

We do not regard it as material that Honore was insolvent, and that Hutchings took no other security for his money than the land itself; nor that, under our construction of the contract, in case the property decreased in value, it was optional with

(a) DEED OF TRUST, AND THE SAME IN THE NATURE OF A MORTGAGE.—"There is a well settled distinction between an absolute deed of trust, and a deed of trust in the nature of a mortgage. The one is *conditional* and *defeasible*, the other is *unconditional* and *indefeasible* for the purposes of the trust, *Hoffman v. Macall*, 5 Ohio State, 125.

WHERE A DEED ABSOLUTE WILL BE HELD TO BE A MORTGAGE.—In *Irwin v. Longworth*, 20 Ohio R., 581, it was held: "Where a conveyance of real estate is made to a trustee to indemnify the surety of the grantor, and the surety, after paying the debt, takes a conveyance from the trustee in satisfaction of the debt, under an order from the heirs of the grantor, made 'for the safety of the trustee,' and under an impression that they 'have no interest in the premises,' the equitable interests of the heirs are not thereby prejudiced. If the trustee in such a case, convey to the surety in satisfaction of the debt of the grantor, the surety, as to minor heirs of the grantor, takes the premises charged with the trust, and the original trustee will be responsible for a breach of trust by his grantee. In such case an order to the original trustee to convey to the surety, executed by the heirs *for the safety of the original trustee*, is not a surrender of the equity of the heirs in the premises so conveyed, unless the order contain words which expressly or by inference surrender the equity. If it is proved, *aliunde*, that the object of the order to convey was to invest the grantee of the original title with the perfect title, relieved of all equities, such order can only be held effectual for that purpose when executed with a proper understanding and knowledge, on the part of the heirs, of their just rights. This rule applies, though there has been no actual fraud or imposition practiced on the heirs. When a grantor conveys premises absolutely in fee to a third person for the purpose of indemnifying his surety, with the assent of the surety, and the grantee executes a declaration of trust accordingly, the conveyance will, in equity, be deemed a mortgage, and the grantor and his heirs will have an equity of redemption in the premises, until it is regularly assigned, foreclosed, or barred by lapse of time."

Honore whether he would pay or not, and if he failed to pay, that Hutchings would be without remedy as to his share of the loss. This circumstance is not conclusive, nor even very formidable. In the case of *Edrington v. Harper*, before cited, it was expressly agreed that it should be optional with the mortgagors whether they would repay the money advanced or not, and yet the court held that this being virtually the fact in every mortgage as to whether the condition should be forfeited or not, it could not have the effect of converting what would otherwise have been a mortgage into a conditional sale.

The distinction between a conditional sale and a mortgage, as drawn by Greenleaf, is that "where the debt forming the consideration of the conveyance still subsists, *or the money is advanced by way of loan*, with a personal liability on the part of the borrower to repay it, and by the terms of the agreement the land is to be reconveyed on payment of the money, it will be regarded as a mortgage; but where the relation of debtor and creditor is extinguished, or never existed, there a similar agreement will be considered as merely a conditional sale," 2 Greenleaf's Cruise, note 1, page 74.

In this case, Hutchings advanced the money, by way of a loan, to his copurchaser, Honore, who is personally liable to repay it with interest at the rate of ten per cent per annum, and had he done so before the land was sold, would have been entitled to a conveyance of the one-half held in trust for him by Hutchings. The fact that Hutchings was to have *interest* on the money advanced tends very strongly to show that it was a loan, *Colwell v. Wood*, 3 Watts, 196, and would perhaps warrant that conclusion, even if the fact was left in doubt by the terms of the written memorandum of agreement.

It is further insisted that Honore, being the agent of Tiernan, could not have become a joint owner of the land; that the policy of the law forbade him from selling to himself. In all cases in which the agent has discretion as to the price, or where the principal relies upon his knowledge or information as to the value of the property, and expects him to sell for what in his opinion the same is worth, this rule should be inflexibly enforced. But in this case Tiernan, the principal, was a real estate agent himself, doing business within a short distance of the property sold,

and well acquainted with its value. He fixed the price at which it was to be sold, and offered to sell to Honore, or any one else whom he could find, at the price so fixed. Through the exertions of his agent, he secured the sale of his property at the price fixed by himself, and as *he* does not complain, so far as it appears from this record, of bad faith or unfairness upon the part of Honore, there can be no good reason why Hutchings should be allowed to make available any such defense.

Hence we conclude that Hutchings held the legal title to one-half of the Tiernan land in trust for Honore, and that the latter is entitled to one-half of the net profits realized upon the resale of the same. In the settlement of the accounts between the parties, Hutchings should be credited with the six thousand dollars advanced, with interest at the agreed rate from the time it was paid up to the sale of the land; also with all other amounts paid by him on account of taxes or assessments against the land, or of other necessary and proper expenses incurred and paid by him in the management of the same, with legal interest on each amount from the time of payment up to the sale; and in these expenses should be included such sum as he may have paid John M. Tiernan for choice of lots when the sixty acre tract was divided. He should also be credited with such reasonable and proper fees or commissions as he may have paid to his agent for negotiating the sale of the land. It appearing that the land was sold for currency, the payments which Hutchings may have collected should be scaled to their actual value in coin at the time of collection.

The judgment of the court below is reversed, and the cause remanded for further proceedings consistent with this opinion. And to prevent further and unnecessary litigation, either party who desires should be allowed to amend his pleadings so as to properly present the issues indicated, and a reasonable time within which to take further proof, in case the same may be necessary under the amended pleadings.

In this case Judge HARDIN did not sit.

To the Petitions of counsel of Appellee for a rehearing, Judge LINDSAY delivered the following response of the Court: The learned counsel for appellee, in their petitions for a rehearing of

this appeal, assume that the contract between Hutchings and Honore, evidenced by the writing bearing date November 18, 1861, was a conditional purchase by the latter of one-half of the tract of land afterward conveyed by Tiernan to Hutchings.

In our opinion, this assumption is not warranted by the facts presented by the record. On the day the writing was executed Hutchings did not own said land, but, upon the contrary, on that day he, in conjunction with Honore, became the purchaser of the same from Tiernan. There was no sale or purchase, absolute or conditional, between the two contracting parties; the exact character of their contract of purchase from Tiernan is not disclosed by the record. We have no means of knowing whether it merely existed in parol or was evidenced by writing; but whatever claim they had to the land was a joint one, each taking as an equal owner, and neither of them having the power to sell to the other an undivided moiety without divesting himself of his entire interest. It is clear that Hutchings still owned one-half of the land after his contract with Honore, and it therefore necessarily results that no sale could have been made. The writing was not intended to evidence a sale, but to explain why it was that Honore, who, under the contract with Tiernan, was entitled to one-half of the land, was to permit Hutchings to take the conveyance of the entire tract to himself. The numerous decisions of the Supreme Court of Illinois, to which we have been referred, were rendered in cases involving questions growing out of conditional purchases; and the doctrines of those decisions do not essentially differ from those to which this Court has uniformly adhered.

In the case of *Greene v. Cook*, 24 Illinois Rep. 190, the facts were that Greene entered the land and paid his own money for it, and took the patent out in his own name, and agreed to sell it to Cook upon condition that he would pay him an amount agreed upon as the purchase-price, on or before a certain day. Cook failed to make the payment, and a second contract was made, a different price agreed upon, and another day fixed for the payment. The transaction was held to be a conditional sale. In that case Cook was not the original purchaser of the land, although Greene entered it under an agreement that he would give a bond to him for a conveyance upon the payment of the

sum agreed upon by the parties within a stipulated time. Greene did not lend to Cook the money or the land-warrant with which to pay for the land, and take the title as security for its repayment. In the language of the court, "nothing was said or done to indicate such a design." In addition to this fact, after the time first agreed upon had expired, a new contract was made by which Cook abandoned all claim to the land under the first arrangement, and became a purchaser in the broadest and most comprehensive sense in which that term is used.

The contract in the case of *Milnor v. Millward*, 39 Illinois, 40, was clearly a purchase upon condition of prompt payment of the agreed price. The agreement in the case of *Brashear v. Gratz*, 6 Wheaton, 529, was also a contract of sale and purchase, and the suit was prosecuted by the party in default to enforce a specific execution of the contract. We have not been able to procure the case of *Perry v. Meddowcroft*, 4 Beavan; but if it goes as far as stated by Hilliard, the principle is in conflict with the decision of Chancellor KENT, in the case cited of *Boyd v. M'Clain*, 1 Johns. Ch. Rep., which decision we regard as in perfect accord with the reason and philosophy of the rules of law governing such transactions.

The opinion originally delivered does not admit of the construction placed upon it by counsel, that we regarded it as optional with Honore whether or not he would pay half of the purchase-price. By disconnecting one paragraph from the remainder of the opinion, and considering that paragraph isolated and alone, such a conclusion might possibly be reached; but when the context is considered, we think it will be manifest to any one that we not only meant to convey no such idea, but stated expressly that Honore was personally liable to repay the loaned money, with interest at the rate of ten per centum per annum.

Nor do we decide that the trust in favor of Honore was created by the contract between him and Hutchings, but that by implication of law a trust resulted in his favor because of the existence of certain facts, among others, that he was a joint purchaser of the land, that Hutchings advanced the money necessary to pay his half of the purchase-price by way of a loan to him, that he was personally liable to repay this money with ten

per cent interest, and that he consented that Hutchings should take and hold the legal title to his share of the land to secure him, on account of his advancement, and the interest agreed to be paid thereon. If these facts are established by the record, and we feel satisfied that they are, then the party claiming to be the *cestui que trust* did pay all of his share of the purchase-money, and, according to the Illinois decisions cited, a trust was raised in his favor by implication of law.

A careful reconsideration of the cause, and a patient investigation of the authorities to which we have been referred, have failed to convince the Court, as now constituted, that the opinion as delivered in January last, does not settle the questions involved in accordance with the well-established principles of equity, and we are therefore constrained to overrule the motion for a rehearing, as well as that of the appellant for a modification of said opinion.

Judge HARDIN did not sit in this case when it was decided, and did not participate in the action of the Court in passing upon these motions.

[NOTE.—W. P. D. BUSH, Esq., the Official Reporter of the Kentucky Court of Appeals, has kindly furnished advance sheets of the preceding three cases.]

JOHN BENJAMIN HEATH, *et als*, v. THE ERIE RAILWAY CO.,
JAY GOULD, JAMES FISK, JR., AND FREDERICK A. LANE.

[Decided in April, 1871, in the United States Court for the Southern District of New York, by Judge SAMUEL BLATCHFORD. Reported in 8 Blatchford's Circuit Court Rep. 347.]

The cases reviewed, on the question as to when a stockholder in a private corporation will be allowed to file a bill in his own name, on behalf of himself and all others standing in the same situation, making the corporation a party defendant, to compel the ministerial officers of the corporation to account for breach of official duty, or misapplication of corporate funds (a).

(a) See preceding case of *Washington, etc. Railroad Co. v. Alexandria Railroad Co.*, page 268, and note (b) thereto appended. These authorities sustain Judge BLATCHFORD'S rulings, and for that reason it is unnecessary to give the entire part of his resume of the cases cited by him. In addition to those already referred to, Judge B. cites Angell & Ames on Corporations, sec. 312; *Robinson v.*

Where the bill sets out acts *ultra vires*, in issuing shares of stock, and breaches of trust, which are frauds on the stockholders, inasmuch as such acts and breaches of trust are beyond the power of the corporation to affirm or sanction, it is not necessary that the stockholder should aver that he has applied to the corporation or its board of directors to bring the suit, and that they have refused.

Where the corporation is under the control of the defendants who must be sued, and an excuse is given for the bringing of the suit by the stockholder, which is equivalent to a refusal by the directors, on request, to bring the suit, the suit may be brought by the stockholder, without showing such request and refusal.

A person not a stockholder can not be joined as plaintiff, in such a bill, with persons who are stockholders, and if the suit is a joint one, his want of interest is a good ground of demurrer to the whole bill.

A person who has no shares standing in his name on the books of the corporation, is not a stockholder, although he holds certificates of stock issued to other persons by the corporation, with powers of attorney authorizing the transfer of such shares to him, executed by the persons in whose names the shares stand registered on the books of the corporation, and although the corporation has, on demand, wrongfully refused to allow such transfer to be made to him.

If several trustees are all of them implicated in a common breach of trust, for which the *cestui que trust* seeks relief in equity, he may bring his suit against all of them, or against any of them, separately, at his election, the tort being treated as several as well as joint: And the same doctrine applies to any wrong-doer who is confederated with a fraudulent trustee.

It is not necessary that the directors of the corporation should be made parties to the bill, although the bill prays for an injunction against the corporation, and for a receiver of the corporation, if no relief is asked as against such directors.

The bill in this case was allowed to be amended by striking out the name of a person improperly joined as plaintiff.

THIS case came up on four separate demurrers to the whole bill, by the four several defendants, the Erie Railway Company, Jay Gould, James Fisk, Jr., and Frederick A. Lane, who were the only defendants in the suit. The bill was sworn to on the 8th of April, 1870, and filed on the same day. It was brought by eight persons as plaintiffs, all of whom were aliens and British subjects. Six of the eight plaintiffs were the owners of

Smith, 3 Paige, 222, 233 (a leading case in New York); *Cunningham v. Pell*, 5 Paige, 607; *Peabody v. Flint* (decided in 1863), 6 Allen, 52; *Foss v. Harbottle*, 2 Haire, 461; *Mozley v. Alston*, 1 Phillips, 790; *Gray v. Lewis* (decided in 1869), English Law Rep., 8 Equity Cases, 526, 541; *Atwood v. Meriwether* (decided in 1867), English Law Rep., 5 Equity Cases, 464, note; and others.

The closing part of Judge BLATCHFORD's opinion, on this point, follows in that part of this report which is considered too important to omit.

shares of what was known as the common capital stock of the Erie Railway Company, which was a corporation created under the laws of the state of New York, and which shares stood in their names on the books of the company. One of the eight plaintiffs was the owner of shares of what was known as the preferred capital stock of the company, and which shares stood in his name on the books of the company. The remaining plaintiff, Burt, was alleged to be the owner and holder of shares of the preferred capital stock of the company, for which he held certificates issued by the company, but not to him, and a power of attorney authorizing the transfer of the shares to him, executed by the persons in whose names such shares stood registered on the books of the company. It was also alleged that he was entitled to have such shares standing in his name on the books of the company, but that he had been prevented therefrom by the wrongful refusal of the company to allow such transfer to be made to him, upon his demand duly made therefor.

The bill was very voluminous. Its allegations were, in substance, as follows :

(1.) The company owns and operates a railroad extending from Dunkirk, and likewise from Buffalo, on Lake Erie, to Piermont and Newburg, on the Hudson River, twenty-six miles of the route being through the state of Pennsylvania, and the rest through the state of New York, and also controls and operates a line of railroad extending from its main line to Jersey City, with a ferry connection to the city of New York. (2.) On the 31st of December, 1865, the capital stock of the company consisted of \$8,535,700 of preferred stock, and \$16,570,100 of common stock, being a total of \$25,105,800 in shares of \$100 each, the preferred stock being entitled, in preference over the common stock, to dividends up to the rate of seven per cent per annum, payable semi-annually out of the net savings of the railroad during the current year, after the payment of mortgage interest. (3.) At the election for directors of the company, seventeen in number, in October, 1867, the defendants, Gould, Fisk, and Lane, and one John S. Eldridge, were the chief movers in a combination which resulted in the election, as directors, of themselves and five new directors and eight old directors, Lane having been a director during the previous year, and Gould, Fisk, and Eldridge being also new directors. The directors so elected, other than Gould, Fisk, Lane, and Eldridge, were Henry Thompson, Levi Underwood, Josiah Bardwell, Eben D. Jordan, James S. Whitney, William Evans, Alexander S. Diven, J. C. Bancroft Davis, Homer Ramsdell, Dudley S. Gregory, William B. Skidmore, Frank Work, and George M. Groves. (4.) This election was accomplished, chiefly or entirely, by illegitimate means; namely, by the purchase of proxies for voting, and by borrowing or purchasing and holding, for the briefest possible period, shares of stock, in order that the same might stand in the names of some of the parties acting in concert with them, or whose proxies they could obtain on the day of closing the transfer-

books preparatory to the election, the plan being to obtain control of the company without any real proprietorship in any considerable portion of its stock, in order that such control might be made subservient to the private gain of the majority of the board, consisting of the new members and Lane, without regard to the interests of the company, or the equitable rights of its real shareholders. (5.) The chief immediate object in obtaining control of the company at the time, was to commit it to engagements in aid of the building of the Boston, Hartford, and Erie Railroad, in which some of the parties, and particularly Eldridge, was largely interested; and such aid was given, in the form of a guarantee, by the company, of the bonds of the Boston, Hartford, and Erie Railroad Company. (6.) . . . The latter company has since suspended payment. (7.) The election of directors in October, 1867, was accomplished by the use of about \$70,000 of the money of the Boston, Hartford, and Erie Railroad Company, placed in the hands of Gould for the purpose. (8.) The furnishing of the money, its use, the accomplishment of the election, and the guarantee of the bonds, were all part of a fraudulent conspiracy by which, in return for the money to accomplish the election, Gould, Fisk, and Lane should betray their trust as directors, by using their influence in favor of the guarantee of the bonds, to the prejudice of the interests of the company, and should find their own compensation in such personal advantages as they could obtain by means of their trust and power as directors. (9.) On the 30th of September, 1867, the total amount of the preferred and common stock of the company was \$25,111,210. (10.) In February, 1868, the total amount of the stock was \$32,801,910, being \$8,536,910 of preferred stock, and \$24,265,000 of common stock. (11.) Up to February, 1868, the company had not only met the interest on its bonds, but had paid regular cash dividends of seven per cent per annum on its preferred stock and dividends, although not regularly, on its common stock, and the market value of its common stock was between seventy and eighty per cent. (12.) In February, 1868, the company had its roads in successful operation, and substantially owned the property of the Long Dock Company, and also owned a large amount of property proper for use in operating its roads, which consisted of four hundred and fifty-nine miles of main road, and three hundred and fourteen miles of branches and leased roads, there being a double track of about three hundred and sixty-two miles of its main line, and its average gross earnings, for the three years last past, had been about \$15,000,000 per year.

[The great importance of this case, aside from its celebrity, justifies an extended report of it. The allegations of breaches of trust and specifications of fraud occupy forty pages of the original report, and consequently preclude their republication at length. But for the practical use of the profession, they are abstracted with as much fullness as circumstances will permit. The entire report embraces sixty pages.]

Specifications 13, 14, 15, and 16, charge that Gould, Fisk, and Lane, with others of the directors, made an issue of the common stock of the company, by first issuing the bonds of the company to the amount of \$5,000,000, "purporting to confer upon the holders the right to convert the principal sum into the stock of the company," and which were shortly thereafter converted into stock. That the amount the company received therefor did not exceed \$3,625,000; "but a large sum was realized therefrom by Gould, Fisk, and Lane, and their confederates, and divers methods were adopted to cover up and conceal the excess and deprive the company of the benefit thereof, and enable the said confederates to

retain the same for their private profit." Specifications 17 and 18 allege the issuing of \$5,000,000 more common stock of the company, and set out the manner of its accomplishment; and by which the company realized therefor only \$3,625,000 (the sale of the bonds being at eighty cents on the dollar), and the residue of the proceeds, being the sum of \$375,000, was wrongfully withheld from the company by Gould and Fisk, in combination with Lane and others. (19.) Almost immediately after the last fifty thousand shares of stock were issued, Gould, Fisk, and Lane, with certain of their confederates, in order to avoid the legal consequences of their acts, and to withdraw the pecuniary fruits of the operation from the jurisdiction of the courts of the State of New York, fled to Jersey City, carrying with them many millions of dollars, the property of the company, being proceeds of the stock or bonds, and remained there until they succeeded, by the use of the money of the company and other corrupt means, in effecting arrangements for their return, when they returned. (20.) During such period, "they employed paid guards" from the funds of the company. Specification 21 shows the action of the New York Legislature in regard to these issues of stock. (22.) In July, 1868, Eldridge resigned his presidency of the company, as the result of an agreement between him and Gould, Fisk, and Lane, that he should do so, and that the company should purchase the bonds of the Boston, Hartford, and Erie Railroad Company, to the amount of \$5,000,000, or thereabouts. Jay Gould was made president in his place. At the same time, Gould, Fisk, and Lane secured the control of the Executive Committee of the company, by becoming three of the five members, and the company, by the procurement of Gould, Fisk, and Lane, purchased the bonds of the Boston, Hartford, and Erie Railroad Company, to the amount of \$5,000,000, and they were paid for out of the funds of the company. (23.) Such purchase of bonds was illegal and beyond the corporate powers of the company, and resulted in a large loss to the company; . . . and that said parties knew the same to be illegal, but consummated the same in order to get the control of the company as aforesaid. Specifications 24, 25, and 26, set up that suits had been brought by Richard Schell, and by the procurement of Cornelius Vanderbilt against Fisk, Gould, and Lane, and the company, in which it was sought to make the said Fisk, Gould, and Lane, individually liable for large sums of money; and that to release themselves from their responsibilities, they paid from the moneys and means of the company, to said Schell, the sum of \$429,000, and \$1,000,000 to Vanderbilt. Besides which, on behalf of the company, and as a part of the same transaction, they purchased of Vanderbilt fifty thousand of the shares of the stock of the company, and paid a price exceeding its market value, to wit, \$3,500,000, "resulting in a large loss to the company." Items 26, 27, and 28, specify other wrongful payments by Gould, Fisk, and Lane, from the funds of the company, and that during that time Gould was treasurer of the company, and made the payments, knowing the same to be illegal. (29.) Specifies the large sums of money of the company, aside from the current earnings of the road, which came to the hands of Gould, as treasurer; and (30.) That from Eldridge's retracy, in July, 1868, until October, 1868, "as well as subsequently, Gould, Fisk, and Lane had practically in their own hands the entire control of the affairs and funds of the company." (31.) In July, 1868, "Fisk was made comptroller of the company, and has since continued to exercise, except as Gould and Lane have participated therein, control over the allowance and disallowance of claims against the company. Gould, as president and treasurer of the company, has had supreme control over the company's funds, except in so far

as Fisk and Lane may have participated therein, and has made such uses thereof from time to time, as would best serve the ends of himself and Fisk and Lane. Lane, at the same time, was made, and has thenceforth continued to be, the counsel of the company, with the addition of large powers to those previously exercised by the counsel of the board." (32.) From July to October, 1868, there was no meeting of the board, and the powers of the company were exercised by Gould, Fisk, and Lane, or by them through the Executive Committee, in which they constituted a majority. (33.) "In anticipation of the election of directors to be held in October, 1868, Gould, Fisk, and Lane contrived a scheme for causing themselves, and such other persons only as they should choose for the purpose, to be elected directors of the company at such election; and in order to carry out such scheme, they put in execution divers illegitimate and fraudulent devices. Having made such arrangements as that, at a given date, a very large amount of stock should stand on the books in the names of themselves and their confederates, and of persons whose proxies for voting they could secure by purchase or otherwise, Gould, Fisk, and Lane, as a majority of the Executive Committee, without the knowledge of the other members of the committee, and without any action or knowledge of the Board of Directors, or the knowledge of any member of it, save themselves, and without any previous public notice of an intention so to do, suddenly closed the stock transfer-books of the company on the 19th of August, being about sixty days before the annual election, and at least thirty days earlier than the by-laws of the company contemplated, or the stockholders anticipated, or than had been the usage of the company. They pretended to keep such transfer-books closed from that time until the election, so that, during such period, no stock could properly be transferred into the name of any person so as to enable him to vote thereon, or to prevent the same from being voted on by [another than] the person in whose name it happened to stand at the time of closing the books. But transfers were, during such period, caused by Gould, Fisk, and Lane to be secretly made in certain cases where such transfer would increase the voting power of themselves and their confederates, although transfers were not permitted in any other case. Such arrangements had been made by Gould, Fisk, and Lane, and their confederates, that when the transfer-books were so closed, there stood thereon in the names of themselves "and their confederates," one hundred and fifty-three thousand six hundred and forty shares of stock, the voting power on which at such election was controlled by Gould, Fisk, and Lane, the whole number of shares voted on at such election being two hundred and seventy-four thousand eight hundred and seventy-four. (34.) Although, at the time of the closing of the transfer-books, there stood in the names of the firms with which Gould and Fisk were connected, stock to the nominal amount of nearly \$12,000,000, Gould and Fisk, as to much the greater proportion thereof, had not, nor had their said firms, any beneficial proprietorship of such stock. Such of the stock as, in fact, belonged to Gould and Fisk, or any of their firms, had, in great part, been acquired by the use of the money of the company. (35.) Gould, Fisk, and Lane made a pretended issue and delivery of convertible bonds of the company, to the amount of many millions of dollars, and caused to be executed certificates for a great amount of stock, into which such bonds were proposed to be converted, with the design of voting on such stock, if necessary, in order to control the election; but the new stock was not created, for the reason that they were enabled by other devices to cast votes enough to control the election. (36.) Shortly before the election, Gould, Fisk, and Lane, having secured to themselves the power of controlling

the election, procured to be signed by several of the persons whom they proposed to elect as directors, a paper, by which such persons pledged themselves to support the policy of Gould, or resign their directorship, and they were elected directors under said pledge. (37.) Gould, Fisk, and Lane, or one of them, voted at such election on a large number of shares, in virtue of proxies for voting which they purchased from parties in whose names the stock stood, which parties, in many of such instances, were not the actual owners of such stock, but had previously parted with it, and made delivery by handing over the certificate, with power of attorney to transfer. The price paid for such proxies was derived from the funds of the company. (38.) At such election, in October, 1868, Gould, Fisk, and Lane caused the following persons, in addition to themselves, to be elected directors of the company for the then ensuing year: William M. Tweed, Peter B. Sweeney, Daniel S. Miller, Alexander S. Diven, George M. Diven, Homer Ramsdell, John Hilton, George M. Groves, John Ganson, Charles G. Sisson, O. W. Chapman, J. C. Bancroft Davis, Henry Thompson, and William B. Skidmore. Davis and Skidmore, when they came fully to understand the purposes of Gould, Fisk, and Lane, resigned their offices as directors. Immediately on the election being made, a meeting of the Board of Directors was held, at which the only business transacted was to elect Gould, President, Alexander S. Diven, Vice-President, Fisk, Comptroller, and Gould, Fisk, Lane, Tweed, and Miller, the Executive Committee, and such persons respectively held such offices until October, 1869. Miller is a brother-in-law of Gould, and wholly under his influence. Tweed was and is in entire accord with Gould, Fisk, and Lane. Alexander S. Diven is a person of integrity and good capacity, and of experience in railroad management, and had formerly been an active executive manager of the company, but the position of Vice-President was a nominal one, and especially in view of such pledge made by the directors, said Diven was powerless to thwart the schemes of Gould, Fisk, and Lane. (39.) From and after the day of such election, in October, 1868, until the election of a new board in October, 1869, no meeting of the Board of Directors of the company was held, except in a single instance, where a company, with whom a contract was being made, insisted that the contract should be ratified by the board, on which occasion a special meeting of the board was called for that single purpose, and no other business was transacted. (40.) During the entire year, from October, 1868, to October, 1869, Gould, Fisk, and Lane, in virtue of their offices of President, Treasurer, Comptroller, and Counsel, and as the controlling majority of the Executive Committee, had in their own hands and exercised the absolute control of the affairs of the company, and its funds and property; and, whatever was done during such period in respect of the company and its affairs, was under the control of Gould, Fisk, and Lane, and they are responsible therefor, and for the results thereof, as fully as if there had been no Board of Directors. (41.) During such period, not only did the board exercise no control, as a board, over the management of the company, but the doings of Gould, Fisk, and Lane, as controlling members of the Executive Committee, were, for the most part, kept by them from the knowledge of the individual members of the board, except those who were the close allies and confederates of Gould, Fisk, and Lane, in their schemes of private gain and spoliation of the company, and excepting those, the directors of the company knew little or nothing more of what was going on in its affairs, than if they had not been directors.

[Specifications 42 to 53, inclusive, are similar in character to those preceding, as well as hereinafter given in full. They specify several breaches of

trust—involving millions—and are referred to in Judge BLATCHFORD's opinion hereinafter.]

(54.) During the entire period, from the time when Gould, Fisk, and Lane acquired a control in the affairs of the company, and more especially, from the time when they acquired complete control in July, 1868, continuously up to the present time, they have respectively, from time to time, and on a great many occasions, and habitually, taken advantage of, and abused their trust as directors, officers, and managers of the company, in the making of transactions on behalf of the company on one side, in which they or some of them were interested on the other side, and wherein they obtained great gains to themselves to the loss of the company. (55.) In some instances, such adverse private interests of theirs were in the shape of their being stockholders in the company thus entering into transactions with the Erie Railway Company. In other instances, the transaction purported to be made with some other person than themselves, and without any interest of theirs being apparent on the face of it, although such private interest really existed. In other instances, they, or some of them, received for their own private uses from the parties with whom the transaction was had, allowances by way of compensation for their influence as managers of the company, in causing the transaction to be entered into on its behalf. In other instances, they, or one of them, were openly sellers or lessors of property to the company, or purchasers of property from the company, or otherwise dealers with the company, and the terms on which the company was made to enter into the transactions, were determined on the part of the company, by them as its controlling managers, notwithstanding their personal interest adverse to the company, and such terms were fixed beneficially to their private interest, and unfavorably to the interests of the company. (56.) Among such transactions was the purchase, on behalf of the company, of a water-front property on the Jersey shore, known as the Weehawken Docks property, for which the company was to pay, or agree to pay, the excessive price of about \$1,600,000, and expenditures on such property; the purchase of numerous other parcels of real estate in New Jersey, and expenditures thereon; and the lease to the company, at an extravagant rent, of the offices which it occupies in the building known as the Grand Opera-house, on the corner of Eighth Avenue and Twenty-third Street, in the city of New York, of which building Gould and Fisk, or one of them, claim to be owner or owners. (57.) The purchase of the said Grand Opera-house, and of a number of adjacent houses and lots, was made by Gould and Fisk, or one of them, for about \$700,000, of which about \$300,000 was paid in money, and the remaining \$400,000 was secured by bond and mortgage on the premises. Thereupon, Gould, Fisk, and Lane, as managers of the company, took a lease for a long term from Gould and Fisk individually, or one of them, of a portion of the building, to be occupied for the business offices of the company, and fixed the rent therefor at an amount far beyond its true rental value, and much greater than could in any case with propriety be paid for business offices suitable for the occupation of the company, the rent so fixed being at the rate of \$45,000 per year. The sum of \$300,000, which was paid on account of the purchase-money of such premises, or the greater portion thereof, was in fact taken by Gould and Fisk from the funds of the company, under their control as trustees; and such use of the funds of the company for their private purposes is by them pretended to be justified by the allegation that such amount was advanced by the company to them on account and in anticipation of the rent to become due from the company under such lease.

A large additional amount of the money of the company has been expended by Gould, Fisk, and Lane in furnishing, fitting up, and decorating the offices thus leased, in an unsuitably extravagant style. (58.) At the time of making such lease, the company was in the occupation of business offices at the foot of Duane Street, in the city of New York, which is the starting-point of the ferry which connects their road with the New York side, which offices had been occupied by them for many years, and were sufficient and suitable for their legitimate purposes. Such new offices are located in a portion of the city inconvenient for the legitimate purposes of their business. The location of the business offices of such a corporation in a building occupied, as is said Grand Opera-house, for theatrical entertainments, under the management and direction of Fisk, one of the officers of the company, is unsuitable, discreditable, and prejudicial to the interests of the company, and the keeping of the books and records of the corporation in a building used as a theater, is unsafe and improper.

[Specification 59 sets up what is claimed as the legal rights of the company under the circumstances attending the purchase, etc., of the Grand Opera-house, to wit: That the company is entitled to an equitable lien on the same for all moneys used or advanced as aforesaid (a).]

(60.) During the period in which Gould, Fisk, and Lane have had the control of the company, they have made great profits to themselves, and subjected the company to great loss, by a system of favoritism and discrimination in the rates of freight for transportation over said road of various articles, and especially petroleum, in cases where articles thus transported belonged to Gould, Fisk, and Lane, or one of them, or to firms or companies in which they or some of them had pecuniary interests, such discrimination being made, in many instances, in adjusting the charges for transportation of freight, or by making drawbacks or returns of portions of the freight nominally charged, to an extent which drove off other shippers from sending their freight by said road. . . . (61.) Gould, Fisk, and Lane, on many different occasions since they acquired the control of the company, have wrongfully applied large amounts of the funds and property of the company to the acquisition of property, professedly for the company, which the company had no legal right so to acquire. . . .

[These and similar transactions are charged to have been done by "Gould, Fisk, and Lane, in bad faith, and with full knowledge of such illegality." Specification 63 sets forth the transactions of Gould, Fisk, and Lane with the Narraganset Steamship Company, wherein the funds of the Erie Railway Company are alleged to have been used for their benefit; and 64 asks an accounting therefor.]

(65.) Gould, Fisk, and Lane, since they have had the control of the company, have been accustomed to make large profits to themselves, respectively, in connection with the furnishing of supplies to it, in the shape of discounts, brokerages, bonuses, and in other forms. . . . (66.) On the 20th of May, 1869, an act was passed by the Legislature of New York, providing as follows: "No stockholder, director, or officer of either the New York Central Railroad Company, the Hudson River Railroad Company, or the Harlem Railroad Company, shall be a director or officer of the Erie Railway Company, and no stockholder, director, or

(a) The Erie Railway Company, under its present (October, 1872) management, has brought suit for the recovery of the Grand Opera-house from Gould and the representative of Fisk, now deceased.

officer of the latter company shall be a director or officer of either of the three first named companies. The Board of Directors in each of said companies may so classify the members of such board, by lot or otherwise, that, as nearly as may be, one-fifth of their number shall go out of office at each annual election; and, at the next election of directors in each of the said companies, directors shall be voted for only in place of those whose term shall then expire under the classification aforesaid." That act was procured to be passed by Gould, Fisk, and Lane, with the co-operation of Tweed, who was a member of the Legislature, they pretending therein to represent the company. The provision thereof purporting to authorize such a classification of the Board of Directors as to extend their terms of office to periods of from one to five years instead of a uniform term of one year, was obtained by Gould, Fisk, and Lane for the sole purpose of enabling themselves to perpetuate, for a long term, their control of the company for their own private gain, despite the will of the stockholders; and the passage of the act was not applied for by either of the other three companies named therein, and neither of them has taken any action under the act. (67.) Gould, Fisk, and Lane illegally and fraudulently expended a large amount of the funds of the company in order to obtain the passage of such act. Its passage was obtained by means of the corrupt expenditure of large sums of money of the company in influencing the action of members of the Legislature in favor of the bill; and also large amounts of the money of the company were used by Gould, Fisk, and Lane, by way of compensation to agents employed by them to promote the passage of the law. All these expenditures were fraudulent breaches of trust on their part. . . . (70.) Gould, Fisk, and Lane controlled the annual election held for the election of directors of the company in October, 1869, by means substantially similar to those which they had successfully employed for the like purpose at the election in October, 1868. . . . These acts are alleged to have been the more successful because of a great proportion of the stock being owned in England and other parts of Europe, where it was not known what was going on, and that the *bona fide* owners of stock in this country were discouraged from making any effort to recover the control of their property. . . . In specification 72 it is stated that Gould, Fisk, and Lane claimed that three hundred and fifty-five thousand votes were cast in favor of the Board of Directors then chosen, and in favor of accepting the provisions of the act referred to. It is alleged that such votes were obtained by "voting on stock which had been sold and delivered by handing over certificates and power in the names of the parties originally registered as shareholders, notwithstanding they had parted with and delivered such stock; voting upon stock borrowed or otherwise acquired for a very brief period, so that the same might stand in the names of Gould, Fisk, and Lane, or their associates and confederates, on the day of closing the transfer-books, although returned or parted with immediately afterward, under the plan before set forth; and voting upon proxies obtained by purchase from parties who either owned the stock, or, as was usually the case, had it standing in their names without really owning it." . . . (73.) At the election held in October, 1869, under such circumstances, Gould, Fisk, and Lane caused themselves and the following persons to be elected directors of the company for the ensuing year, namely: William M. Tweed, Alexander S. Diven, Justin D. White, John Ganson, O. W. Chapman, Horatio N. Otis, Charles G. Sisson, Abram Gould, Homer Ramsdell, Henry Thompson, John Hilton, Henry N. Smith, N. R. Simons, and George C. Hall.

[Immediately after the election, they made the classification of directors, by which Jay Gould, Fisk, Tweed, and Lane held for the longest term, and which expired in October, 1874. By specification 74, this classification is alleged to be illegal, because the power to make the same was given only to the board in existence at the time of the passage of the act. . . . Items 75, 76, 77, set forth similar acts to those following the election of 1868, and the further issue and sale of stock of the company; 79 and 80, the remedial measures that are asked for; and 81 specifies the damage done to the credit of the stock.]

"(82.) Within the few months last past, a large number of the shareholders of the company, resident in Great Britain, have become awakened to the necessity of action on their part, in concert with other *bona fide* stockholders, in order to wrest the control of the company from Gould, Fisk, and Lane, and save it from utter bankruptcy, and it has been ascertained that over four hundred and fifty thousand shares of the stock of the company, representing a capital of more than \$45,000,000, are held in Great Britain." . . . Specifications 83, 84, and 85, show the efforts made by legal proceedings to take the company from the control of Gould, Fisk, and Lane, and their associates, and allege that they refused to allow stock to be transferred, on pretense that the same had been enjoined. "(86.) The pretended suit on behalf of a stockholder in the company against the company, wherein such pretended injunction against transfers was obtained, is a fraudulent and collusive suit in the interest of Gould, Fisk, and Lane, set on foot and carried on by them, and subject to their control." Specification 87 alleges that fraudulent suits were instituted by said parties at the expense of the company for their own benefit. "(88.) In one instance, one Peter B. Sweeney, a person possessing great political influence, and whose aid in their schemes they desired to obtain, was nominally appointed receiver of a large fund belonging to the company, and although no portion of such money ever passed into his hands, and he never performed any service as such receiver, he was, on the discharge of his receivership, paid out of the funds of the company about \$150,000 in pretended compensation for his services as such receiver." Specifications 89 and 90 allege further breaches of trust; and 91, breaches of trust in increasing the capital stock and debts of the company. "(92.) As the net results of the two years' management of the company by Gould, Fisk, and Lane, they have reduced the net earnings of the company to the extent of more than \$500,000 a year, while they have increased the amount of its share capital and funded and floating debt from \$51,065,943.23 to \$101,935,710, or to an extent of more than \$50,000,000." . . . Specifications 93 to 101 set forth at length the grounds upon which the plaintiffs ask that defendants should be removed from their trust and a receiver appointed for the company.

The bill prays: (1.) That Gould, Fisk, and Lane, and each of them, may be compelled to render an account of all their trust and management in respect of the property, funds, and affairs of the company, since their election as directors in October, 1867, and of all moneys and funds belonging to the company, which, since that time, have come into the hands or under the control of them, or either of them, and of the disposition of all such moneys; and also an account in respect of all profits, benefits, gains, and advantages which, during such period, they, or either of them, have derived to themselves from the property, funds, or credit of the company, or at its expense, or in anywise by reason of the trust vested in them as executive officers, executive committee, or directors of the company, and in respect of all losses, damages, and injuries to which, during

such period, they have subjected, or caused to be subjected, the company, and in respect of all the allegations and charges contained in the bill. (2.) That Gould, Fisk, and Lane may, by the decree of this court, be adjudged to make payment and compensation to the company, for the benefit of the plaintiffs and the other *bona fide* shareholders, to the full extent of all the profits, benefits, gains, and advantages, and of all such damages, losses, and injuries. (3.) That by such decree, Gould, Fisk, and Lane may be ousted from all management, control, or power in or about the property, funds, or affairs of the corporation, and enjoined from exercising any powers as directors, executive officers, or executive committee thereof, and in any way interfering with the property, funds, or affairs of the company. (4.) That Gould, Fisk, and Lane, and the company, and all its officers, directors, managers, and agents, may be enjoined and restrained, by this court, from issuing any further convertible bonds of the company, and from issuing any further stock, or certificates of stock of the company otherwise than upon surrender and cancellation of certificates of existing valid stock of the company, upon transfer of such stock in the usual manner. (5.) That, by order of this court, in this suit, a receiver may be appointed to take charge of the property, funds, and affairs of the company, including its railroad and appurtenances, and to manage and carry on the same, under the order and subject to the direction of this court, in such manner, and for and during such period, as, under the circumstances, may seem proper. (6.) That, pending this suit, Gould, Fisk, and Lane, and the company, and its officers, directors, managers, and agents, may be enjoined and restrained from issuing and delivering any bonds or obligations of the company, purporting to confer upon the holder thereof any right of converting the same into stock of the company, or of receiving any such stock in exchange therefor, and from issuing, putting in circulation, delivering or aiding in giving currency to any stock or certificates purporting to be for stock of the company, otherwise than on the surrender and cancellation of genuine certificates of existing shares of stock of the company, now standing registered upon its books, on transfer of such stock in the usual manner. (7.) That the plaintiffs may, pending this suit, have such writ of injunction enjoining and restraining Gould, Fisk, and Lane, and each of them, and their attorneys and agents, from exercising any power or authority, and from doing any act as directors, or executive officers or executive committee of the company, and from interfering with any of the property, funds, or affairs of the company, and from disposing of any of such property or funds of the company, and from removing, or suffering or permitting to be removed, from the offices of the company, any of the books, papers, securities, or funds of the company, and from secreting or concealing, or suffering to be secreted or concealed, any such books, papers, securities, or funds. (8.) That the plaintiffs may have such further or such other order, relief, and decree in the premises as may be equitable.

William M. Evarts and Ebenezer R. Hoar, for plaintiffs.
Benj. R. Curtis and David Dudley Field, for defendants.

BLATCHFORD, J.: It is to be noted, that the demurrers are to the whole bill, and the causes of demurrer set forth are set forth as causes of demurrer to the whole bill, and there is no demurrer to any separate part of the bill. The first cause of

demurrer set forth is a general want of equity in the bill, and an absence of title therein to any of the relief prayed for. The second cause of demurrer is the want of parties, the absent and necessary parties being specified.

Under the first cause of demurrer, the defendants advance the propositions: (1.) That the bill states no cause of action, even in favor of the plaintiffs other than Burt; (2.) That Burt is improperly a plaintiff, because he is not a stockholder in the company; (3.) That if, on that ground, the bill can not be sustained on behalf of Burt, it can not be sustained on behalf of any of the plaintiffs. The principal discussion, on the hearing, was on the first of these three propositions.

After considering at length the right of stockholders to sustain the suit, in proceeding upon the same point, the Court said: The case of *Hoole v. Great Western Railway Company*, in 1867, Eng. Law Rep., 3 Ch. Appeal, 262, was a case before Vice-Chancellor WOOD. A shareholder in a corporation, on behalf of himself and all his co-shareholders who were not defendants, filed a bill in equity against the corporation, its directors, and its secretary, alleging that the corporation had acted *ultra vires* in issuing certain shares, and was about further to act *ultra vires* in issuing certain other shares, and praying for a declaration that the corporation was not entitled to issue such shares, and that those which had been issued be canceled, and that the corporation be enjoined from paying dividends on those which had been issued, and that the corporation and its directors be enjoined from issuing any more of such shares. The corporation demurred to the bill for want of equity, and the Vice-Chancellor overruled the demurrer. He also enjoined the corporation from issuing further shares, and gave liberty to apply for an injunction, in case a dividend should be declared on shares which had been already issued. The corporation appealed, and the appeal was heard before the Lords Justices, holding the Court of Appeal in Chancery. Lord Justice CARNES, while holding that the issuing of the shares was believed, by all the parties concerned in issuing them, to be most advantageous to the corporation and to every person concerned, and regretting that the arrangement did not meet with the unanimous assent of all the shareholders, declared, that if the issuing

of the shares was *ultra vires*, and therefore illegal, any member of the corporation might dissent from it, and had a right to appeal to a court of equity to be protected against its effects. On the question of power, he held that the issuing of the shares was *ultra vires*, that the equity of the bill was clear, and that the order for the injunction, as regarded equity, was entirely correct. He also declared, that he had a very strong opinion that any corporator, or member of a company, may maintain a bill against the corporation and the executive, to restrain them from doing an act which is *ultra vires*, and therefore illegal, without making the bill a bill on behalf of other shareholders. Viewing the prayer of the bill in regard to canceling the shares issued, not as praying for relief affecting the individuals holding the shares, as purchasers or otherwise, but as a request to the court to order the executive of the company to take steps, under their own responsibility and at their own expense, to cancel or get in the stock improperly issued, he held that, in regard to the prayer for an injunction against paying dividends on the shares already issued, the holders of such shares were sufficiently represented in the suit by one of the defendants, who was a director, and held some of such shares. He sustained the bill, and the order for the injunction. Lord Justice ROLT, in his opinion, said it was possible and very probable, that the arrangement proposed by the issuing of the shares was very beneficial; that if it were within the power of the corporation, the decision of the governing body might, upon the principle adopted by the court, in *Mozley v. Alston*, 1 Phillips, 790, and *Foss v. Harbottle*, 2 Haire, 461, be held to govern; but that, if the scheme proposed was altogether beyond their power, the court had nothing to do with the merits, but had only to see that the corporation did not exceed its powers. He held, that the scheme was beyond the powers of the corporation, and that the order overruling the demurrer, and the order granting the injunction, were right. He added: "If the act complained of is illegal, as I think it is, I do not at present see why any single shareholder should not be at liberty to file a bill to restrain the company from exceeding their powers. . . . If one individual having an interest complains of an act of the whole company as being illegal, there is, as a general rule, no necessity for any

other shareholders being parties." (See, also, *Bonham v. Metropolitan Railway Co.*, in 1868, Eng. Law Rep., 3 Ch. Appeals, 337, before Vice-Chancellor WOOD, and, on appeal, before the Lord Chancellor CHELMSFORD.)

The case of *Foss v. Harbottle*, and *Mozley v. Alston*, were cited and relied on by the defendants in the case of *Gregory v. Patchett*, in 1864, 33 Beavan, 595, in which case the Master of the Rolls, Sir JOHN ROMILLY, says that he has examined the various cases on the subject, and the result of them is, that in matters strictly relating to the internal management of a company, even though the court should come to the conclusion that the course adopted is not warranted by the terms of the charter, the court will not interfere, even though the minority should have summoned a meeting of all the shareholders, and the majority should have persisted in the course complained of (the general body of the shareholders, at meetings duly convened for the purpose, being the ultimate governing body); but that, if the measures adopted are plainly beyond the powers of the company, and are inconsistent with the objects for which the company was constituted, the court will, at the instance of the minority, interpose to prevent the performance of the act complained of, and it will do so whether an appeal has or has not been made by the minority to the shareholders generally.

The following cases in courts in the United States were cited and relied on by the defendants: *Hersey v. Veazie*, 24 Maine, 9; *Dodge v. Woolsey*, 18 Howard, 331; *Allen v. Curtis*, 26 Connecticut, 456; *Bronson v. La Crosse Railroad Co.*, 2 Wallace, 283; *Memphis City v. Dean*, 8 Wallace, 64; and *Samuels v. Express Co.*, M'Cahon's Rep., 214.

Judge BLATCHFORD thereupon proceeded to examine each one of the cases referred to, and continued: In the bill before us there are many acts set forth which are *ultra vires*. On the allegations of the bill, it would appear that all issues of stock by the company, other than such as were specifically authorized or approved by the acts of April 4, 1860, April 2, 1861, March 28, 1862, May 4, 1864, and April 21, 1868, were unauthorized and illegal, and that no authority for the issuing of any stock by the company can be derived from the tenth subdivision of the twenty-eighth section of the General Railroad Act of April 2,

1850. Besides the issue of stock not covered by the acts of 1860, 1861, 1862, 1864, and 1868, there are in the bill many acts charged in respect to the use and application of the corporate funds of the corporation, which were *ultra vires* of the corporation, and breaches of trust on the part of Gould, Fisk, and Lane, who constituted a majority of the Executive Committee, to which committee, according to the bill, the administration of the affairs and funds of the company appears to have been wholly given up by the Board of Directors. The bill, among other things, prays for preventive relief, by injunction, to restrain the corporation from issuing any new certificates of stock, except on the surrender and cancellation of certificates for existing valid stock, on a regular transfer thereof, and to restrain Gould, Fisk, and Lane, who have committed such breaches of trust, from exercising any further powers as directors, executive officers, or Executive Committee of the company, and from interfering with or disposing of its property, funds, or affairs.

Now, so far as the bill sets out acts *ultra vires*, in issuing stock, and breaches of trust, which are frauds on the stockholders, such acts and breaches of trust are beyond the power of the corporation or its directors to affirm, or sanction, or make good; and, in such case, the authorities agree that the reason of the rule for an application to the corporation, or its Board of Directors, to bring the suit, does not exist. Such reason is, that while the stockholder is prosecuting his suit, the corporation, through its Board of Directors, may affirm and make good the acts complained of. But the rule ceases when the reason ceases. The bill is, therefore, clearly maintainable, in respect to the acts *ultra vires* which it sets forth, and the preventive relief it seeks, founded thereon, without reference to any thing else contained in it (a).

(a) *Hazlehurst v. Savannah, Griffin and N. Alabama Railroad Co.*, 43 Georgia, 13: It is not *ultra vires* for a railroad company, by its directors, to contract to issue to contractors for the completion of the road preferred stock in the company, in payment for work to be done, and to agree that a majority of the directors shall be the holders of a certain number of shares of said preferred stock; provided the number of shares agreed to be issued does not make the whole amount of shares greater than the capital stock authorized by the charter.

The Macon and Brunswick Railroad Company has no power, under its charter, to purchase stock in another railroad, or to contract with others, for a consideration, to purchase the same, and run it in the control of said other road

It is a rule of equity pleading, Story's Eq. Pl. 463, that, if a demurrer covers the whole bill, when it is good to a part only, it will be overruled, *Livingston v. Story*, 9 Peters, 632, 658. The demurrers, in this case, cover the whole bill. The first cause of demurrer assigned in each, the want of equity, or, that the plaintiffs have not stated such a case as entitles them to any such relief as they seek, is a cause of demurrer to the whole bill, and to each and every part of it. The demurrer, for want of equity, must, therefore, be overruled, as the bill is, at least, good in part. The thirty-second of the Rules in Equity, prescribed by the Supreme Court, allows a defendant to demur to the whole bill, or to a part of it.

But I think the bill states a case which brings it within the settled principles as to allowing a bill by a stockholder, where the corporation is under the control of the defendants who must be sued, and an excuse is given for the bringing of the suit by the stockholder, which is equivalent to a refusal by the directors, on request, to bring the suit. . . .

The Court, after stating the circumstances attending the election of the Boards of Directors for 1868 and 1869, proceed as follows: It was during the period between October, 1868, and October, 1869, that the share capital of the company was increased by over \$32,000,000. Of the seventeen directors elected in October, 1869, eight (excluding Gould, Fisk, and Lane) are persons who thus wholly neglected their duties, and abnegated their functions, during the year ending in October, 1869. As to them, and as to their six new associates, brought in in October, 1869, the bill alleges that, as a Board, they possess no independent force for controlling Gould, Fisk, and Lane; that Gould, Fisk, and Lane have practically the absolute and unchecked control of the corporation, and its funds, property, and affairs; that Tweed is in full accord with them in their schemes for private gain at the expense of the company, and has been, and is, personally interested in many of such schemes; that Smith was a copartner with Gould in said firm of Smith, Gould, Martin & Co.; that Hilton, White, Otis, and Hall are salaried employees of the company, holding their offices at the

for the benefit of the Macon and Brunswick Railroad. Such a contract is *ultra vires*, . . . and any stockholder may come into equity to prevent it.

pleasure of Gould, Fisk, and Lane, or of Gould alone, and have only a nominal and trifling interest, if any, as shareholders in the company; and that Simons is in a substantially like relation with Gould, Fisk, and Lane, being a salaried employee of the Narraganset Steamship Company, which is under the management and control of Gould, Fisk, and Lane. Gould, Fisk, Lane, Tweed, Hilton, White, Otis, Hall, and Simons constitute a majority of the seventeen directors. The bill also avers, that the independent action of some of the other eight directors is compromised by reason of their being under some pledge to support the policy of Gould, or resign, or they are in too small a minority to interpose any substantial check to the operations of Gould, Fisk, and Lane, supported, as they are, by an overwhelming majority of the Board in their interest, and that such other directors are in such relations with Gould, Fisk, and Lane, as have prevented, and will prevent, them from, in any way, causing to be exerted the corporate power of the company to bring Gould, Fisk, and Lane to account. The bill sums up its conclusion from the facts alleged in this regard, by averring that the rights and equities, claims and demands, in favor of the company, which are set forth in the bill, can not be enforced by suits brought in the name and on behalf of the company, for the reason that the control of the company is wholly in the hands of Gould, Fisk, and Lane, and the plaintiffs are wholly unable to procure the bringing of a suit in the name of the company as plaintiffs against them. The allegations of the bill show satisfactorily that the company is under the actual potential control of the defendants Gould, Fisk, and Lane, within the rule of equity jurisprudence before referred to, so that it would be a mockery to require or permit a suit against them to be brought and prosecuted, under their management, to obtain the relief sought by this bill. These allegations are admitted by the company, which speaks for all the directors, by the demurrer which it has interposed. It is urged, by the counsel for the defendants, that the allegation of the bill, that the Board of Directors, elected in October, 1869, is so constituted that it possesses no independent force for controlling Gould, Fisk, and Lane, is a simple impossibility, for the reason that the fourteen directors do possess an independent force to control the three. But the

facts set forth in the bill show that this is no impossibility. An absence of control is shown, facts showing dependence are shown, a failure to exhibit force is shown, a surrender of the entire corporation to Gould, Fisk, and Lane is shown, and a moral paralysis on the part of the fourteen directors is shown, which warrants the statement in the bill. If there ever was a case which called for the remedial power of a court of equity to be exerted, at the suit of a stockholder for the benefit of himself and of his co-stockholders and of the company, to take cognizance of fraudulent breaches of trust on the part of the controlling directors, this is such a case; and it is a case where sufficient ground for the interposition is shown, without requiring a direct request to the corporation to prosecute, and its refusal.

Burt is not a stockholder, and is improperly joined as a plaintiff. As the suit is a joint one, his want of interest is a good ground of demurrer to the whole bill, Story's Eq. Pl. sec. 509. The objection is one to the substance of the bill. But the plaintiffs may, if they desire, under Rule 35 of the Rules in Equity prescribed by the Supreme Court, amend their bill, on payment of costs, by striking out the name of Burt as a plaintiff, and the allegations of the bill in regard to his claim to stock.

It is set forth as a ground of demurrer to the bill, that Eldridge, Thompson, Underwood, Bardwell, Jordan, and Whitney, are necessary parties to the bill, as being stated therein to have been concerned in the illegal and fraudulent acts in respect of which the bill asks relief. These six persons were six of the directors from October, 1867, to October, 1868. This objection, if of avail, would apply equally to Evans and Gregory, who were directors during the same period, and to Groves, Sweeney, Miller, and G. M. Diven, who were directors from October, 1868, to October, 1869, for, while there are allegations in the bill, of complicity in breaches of trust and in fraudulent acts, that are applicable to the six directors so specified in the causes of demurrer, there are other such allegations that are applicable, some of them to the first two, and the others to the last four, of the last named six directors, who are not specified in the causes of demurrer as necessary parties. I exclude Work, Davis, and Skidmore, because of the allegations in the bill in regard to them.

But it is not necessary to make any of such twelve persons parties. The well-settled rule is, that, if there are several trustees who are all implicated in a common breach of trust, for which the *cestui que trust* seeks relief in equity, he may bring his suit against all of them, or against any one of them separately, at his election, the tort being treated as several as well as joint, Story's Eq. Pl. sec. 213; *Cunningham v. Pell*, 5 Paige, 607, before cited.

Nor is it necessary that the Boston, Hartford, and Erie Railroad Company, or Schell, or Vanderbilt, or the Narraganset Steamship Company, should be parties to the bill. No relief is prayed for against them. The transactions with them by Gould, Fisk, and Lane, which are complained of, are set forth, but the bill seeks to charge Gould, Fisk, and Lane as tort-feasors. If the parties named have been in collusion with Gould, Fisk, and Lane, in wrongfully obtaining the funds of the company, Gould, Fisk, and Lane have no right of contribution over against such parties, and, therefore, can not require them to be made parties to the suit. As to the company, the tort of each wrong-doer against it is several, and neither in a suit by it nor by its stockholders is every one of the wrong-doers a necessary party, because some one wrong-doer is a proper party. The doctrine above referred to in regard to several trustees implicated in a common breach of trust, applies equally to any wrong-doer confederated with a fraudulent trustee.

It is alleged, as a cause of demurrer to the whole bill, that the fourteen persons other than Gould, Fisk, and Lane, who were, with them, elected directors of the company in October, 1869, are necessary parties to the bill, inasmuch as the bill prays to have the classification of directors of October, 1869, set aside, and thus shorten the term of such fourteen persons, who appear by the bill still to be directors of the company. Even if such fourteen persons be necessary parties in respect of the relief prayed in regard to such classification, and even if a demurrer to such relief would be maintainable for want of such parties, yet the demurrer in this particular is too general and must be overruled, because it covers the whole bill, and should have been a demurrer only to the relief prayed in regard to such classification, Story's Eq. Pl. sec. 443; *Livingston v. Story*, 9 Peters, 632, 658.

The objection that such fourteen persons ought to be made parties, as appearing to have been directors when the bill was filed, for the reason that the bill asks for an injunction against the corporation, and for a receiver of the corporation, is not well taken. The relief so asked is against the corporation. If such fourteen persons were made parties, they would be merely nominal parties and not real parties, in respect to any relief that is asked against the corporation; and no relief is asked against them, except in respect to the matter of classification, which has already been disposed of. This question was fully considered in the case of *Hatch v. The Chicago, Rock Island and Pacific Railroad Co.* 6 Blatchf. C. C. R. 105, 114 to 116.

The views already stated dispose of the objection that Tweed is not a party to the bill. Though he is charged to have been in complicity with Gould, Fisk, and Lane, relief is not asked against him. It results, therefore, that the demurrers are overruled, and the bill is sustained in all particulars, except as to the joining of Burt as a party plaintiff, as to which the plaintiffs may amend, as before stated, on payment of costs.

SHORE v. WILSON.—LADY HEWLEY'S CHARITIES.

[*Decided in the House of Lords in 1842, Lord COTTENHAM delivering the opinion, in which Lord BROUGHAM concurred. Reported in 9 Clarke & Finnelly's Reports, 355.*]

Trusts for Charities—Protestant Dissenters—Unitarians—Construction of Deeds—

Extrinsic Evidence.—By deeds executed in 1704, Lady Hewley conveyed estates to trustees, upon trust to pay out of the rents such sums, yearly or otherwise, to such poor and godly preachers for the time being of Christ's holy Gospel, and to such poor and godly widows for the time being of poor and godly preachers of Christ's holy Gospel, as the trustees for the time being should think fit; and to dispose of such sums, and in such manner, for promoting the preaching of Christ's holy Gospel in such poor places as the trustees for the time being should think fit; and also to dispose of such sums as exhibitions for educating such young men designed for the ministry of Christ's holy Gospel as the trustees for the time being should approve and think fit; and to dispose of the remainder of the said rents in relieving such godly persons in distress, being fit objects of her and the trustees' charity, as the trustees for the time being should think fit; and she directed,

that when any one of the trustees should die, the survivors should elect in his place such a person as they in their judgments and consciences should think fit to be a trustee.

By other deeds, executed in 1707, Lady Hewley conveyed other estates to the same trustees, partly for the support of poor old people in an alms-house, for the management of which she appointed other trustees; and, after directing that the trustees and managers should observe the rules which she should leave for the selection and government of the poor people therein, she ordered the residue of the rents to be applied upon trusts, which were the same as those contained in the deeds of 1704. By the rules left by her for the selection of the old people for the alms-house, she ordered that none be admitted but such as should be poor and piously disposed, and of the Protestant religion, and able to repeat by heart the Lord's Prayer, the Creed, the Ten Commandments, and Bowles's Catechism.

At the dates of the deeds, all religious sects tolerated by law believed in the Trinity; but in the course of time the estates became vested in trustees of whom the majority were Unitarians, and they applied the rents for the benefit of Unitarians; and that sect became tolerated by law. *Held*, by the Lords—affirming judgments of the Court of Chancery, on an information filed in 1830—that neither Unitarians nor members of the Church of England, but Protestant Dissenters only, are entitled to the benefit of the charities, and that all the trustees were properly removed, as all concurred in the misapplication of the charity funds; *semble*, that Unitarians, in the present state of the law, are capable of partaking of such charities, founded for their benefit.

Held, that for the purpose of determining the objects of Lady Hewley's charity, under the terms, "godly preachers of Christ's holy Gospel," "godly persons," and the other descriptions contained in her deeds, extrinsic evidence is admissible to show the existence of a religious party by whom that phraseology was used, and the manner in which it was used, and that she was a member of that party; *semble*, that in putting a construction on the deed of 1704, the provisions of the deeds of 1707 are not to be referred to.

A decree declaring, in the terms of a prayer of a charity information, that certain persons are not entitled thereto, is not defective for not also declaring who are entitled.

THE suit in which this appeal arose was instituted by an information filed in 1830, in the name of the Attorney-General, for the purpose of administering certain charities founded in the years 1704 and 1707, by Dame Sarah Hewley, by distinct sets of deeds, and placed under the direction of distinct sets of trustees. The question for decision in the appeal turned upon the construction of the foundation deeds, and on the admissibility of certain evidence given to show the intentions of the foundress.

The history of the charity is briefly this: Lady Hewley, the foundress, was, on her husband's death, left with a very ample fortune. She was a pious lady, and took a deep interest in the

fate of the ejected ministers on St. Bartholomew's Day, 1662, under the Act of Uniformity, who could not by law, until after the Revolution, and the Act of Toleration was passed, celebrate the rites of religion according to their consciences. Lady Hewley bountifully assisted and supported a considerable number of them, at a time when the celebration of the rites of religion, which they professed, was contrary to law. She did not withdraw her bounty from the non-conformist clergy after the Revolution; and after the Act of Toleration had passed, she, in the years 1704 and 1707, executed deeds, by which a large portion of her fortune was conveyed to trustees for religious and charitable purposes. These deeds were prepared by the advice of counsel, skillfully framed, and expressing in definite and distinct terms the objects that she had in view.

The relators offered evidence to show that Lady Hewley and the original trustees of the charities, and Mr. Bowles, whose Catechism she desired to be used in the alms-house, were Trinitarian Dissenters, believing in the divinity of the person of Jesus Christ, and in the doctrines of Original Sin and the Atonement. And to prove the misapplication of the charity funds, it was shown, from a list given in by the trustees, that out of two hundred and thirty-seven persons receiving aid from the charity funds at the time when the information was filed, thirty-eight were by reputation Unitarians in doctrinal opinions, and most of them preached in old Presbyterian chapels, the ministers of which always received aid from the charity.

The case was heard by the Vice-Chancellor in 1833. He adjudged and decreed that ministers or preachers of what is commonly called Unitarian belief and doctrine, and their widows and members of their congregations, and that persons of what is commonly called Unitarian belief and doctrine, are not fit objects of, and are not entitled to partake of the charities of Dame Sarah Hewley; and for this misapplication of the trust fund in distributing the charity to such persons, the defendants, the trustees, were removed, and measures taken for the appointment of others.

An appeal from the Vice-Chancellor's decree was taken to the High Court of Chancery, and argued for four days before Lord Chancellor BROUGHAM, but he resigned the great seal

before the arguments were finished. In 1835 it was argued *de novo* before Lord Chancellor LYNDHURST, assisted by Mr. Justice PATTESON and Mr. Baron ALDERSON. These learned judges gave a lengthy joint opinion; and in 1836, after hearing it, the Lord Chancellor pronounced his judgment, concurring with them, affirming the Vice-Chancellor's decree, and dismissing the appeal.

From this decree and order, the trustees appealed to the House of Lords, and the appeal came to be heard in 1839, in the presence of the learned law judges, to wit: Justices MAULE, ERSKINE, COLERIDGE, and WILLIAMS, Barons GURNEY and PARKE, and Lord Chief Justice TINDAL, who were summoned to attend the sittings of the House of Lords for that purpose.

The case was argued at length by Attorney-General Sir *J. Campbell*, and the Solicitor-General, for the appellants. On the part of the respondents, by Mr. *Knight Bruce* and Mr. *Kindersley*.

The questions of law submitted to the judges for opinions thereon, were these:

1. Whether the extrinsic evidence introduced in this cause, or what part of it, is admissible for the purpose of determining who are entitled, under the terms "godly preachers of Christ's holy Gospel," "godly persons," and the other descriptions contained in the deeds of 1704 and 1707, to the benefit of Lady Hewley's bounty?

2. If such evidence be admissible, what description of ministers, congregations, and poor persons, are the proper objects of the trusts of those deeds respectively?

3. Whether, in putting a construction upon the deed of 1704, any and which of the provisions of the deed of 1707 may be referred to?

4. Whether, upon the true construction of the deed of 1704, ministers or preachers of what is commonly called Unitarian belief and doctrine, and their widows and members of their congregations, and persons of what are commonly called Unitarian belief and doctrine, are excluded from being objects of the charities of that deed?

5. The same question as to the deed of 1707?

6. Whether such ministers, preachers, widows, and persons, are, in the present state of the law, incapable of partaking of such charities, or any and which of them?

The judges attended the session of the House of Lords, in May, 1842, and severally delivered lengthened opinions. Justice MAULE, alone, was of opinion that the decree appealed from should be reversed.

[This case was one of the most elaborate ever brought to the House of Lords for final decision. The report in 9 Clark & Fennelly, 355, gives a full abstract of the pleadings and testimony, and the opinions and judgments at length. Altogether, it is one of the most interesting cases ever reported; and great practical benefits are to be derived from the thorough examinations made therein of the points of trusts involved. To give here a more enlarged abstract of the case would exceed our space; but the reader is referred to the original report, occupying two hundred and twenty-seven pages. The opinion of Lord COTTENHAM, which follows, practically closed this extended litigation.]

Lord COTTENHAM, on August 5, 1842, moved the judgment of the House, as follows: My Lords, the opinions which have been delivered by the learned judges have so far exhausted this case in all the most material parts of it, that I do not deem it necessary to enter at large into the very interesting and important matters which were discussed at the bar.

The principal object of the suit was to have it declared that ministers or preachers of what is commonly called Unitarian belief and doctrine, and their widows, and members of their congregations, or persons of what is commonly called Unitarian belief and doctrine, are not fit objects of the charity. The decree appealed from established the affirmative of that proposition, and of the seven judges who attended the hearing at the bar of this House, six concurred in it. I can not suppose that your Lordships will think that there is ground for differing from this opinion; and if that should be your Lordships' feeling upon it, the result will necessarily be an affirmance of the decree. I can not, however, omit to make some observations as to the *media* through which this conclusion has been arrived at by the different authorities by whom the subject has been considered.

Your Lordships will have observed that in the discussion in the Court of Chancery a very large range of evidence was admitted, with a view of coming to a decision as to what was the intention of Lady Hewley, which could, after all, only be judged of by the language and terms used in the deeds. In what respect and for what purposes this evidence was properly received was the subject of one of the questions put to the learned judges, and has been the subject of some difference in their opinions. It does not appear to me necessary to consider minutely those differences, because I conceive that, keeping strictly within those rules which all the opinions recognize, there is sufficient,

upon the view taken by the great majority of the judges, to support the conclusion to which they have come upon the main point in the case.

It was very clearly and shortly laid down by Mr. Baron GURNEY, that that part of the evidence which goes to show the existence of a religious party, by which the phraseology found in the deeds was used, and the manner in which it was used, and that Lady Hewley was a member of that party, is admissible, that being in effect no more than receiving evidence of the circumstances by which the author of the instrument was surrounded at that time.

Much evidence, indeed, appears to have been received, which, if of a nature to be received, might fall under the same rule, but which was objectionable upon other grounds, such as the opinions of living witnesses. But rejecting all such evidence, enough appears to me to remain unobjectionable in itself, and properly received for the above purpose, to support the conclusion to which a great majority of the learned judges have come.

I have thought it right to make these observations upon this matter of evidence, as otherwise the affirmance of the decree might seem to sanction the receiving all the evidence received below, which might tend to introduce much doubt and confusion in other cases.

It may be thought that this opportunity should be taken of specifying what description of persons are hereafter to be considered as proper objects of the charity. I think that any attempt to do this would be dangerous, and would be more likely to promote than to prevent further litigation, as it is impossible, *a priori*, to foresee the consequences of any such declaration, or to have sufficient information as to the various interests upon which it may operate, and which are not represented in this suit. What has passed in this cause, and the valuable opinions which the judges have delivered, will, it may be hoped, afford such light to the trustees as to enable them satisfactorily to administer the funds for the future.

It was made part of the complaint upon this appeal, that some of the trustees had been removed, as to whom it had not been proved that they entertained opinions inconsistent with the declared purposes of the trust. I do not consider the removal

of any of the trustees as implying any reflection upon their moral conduct. But as by the decision of the Court it was found that the application of the funds for the time past had not been consistent with what appeared to the Court to be the real object of the charity, and as a larger discretion must necessarily be left to the trustees for the future, I think that, as a matter of discretion, it was right to select others for the future management of the funds; and if that was right in 1833, it certainly would be indiscreet to adopt a different course in 1842. I can not, therefore, think that it will be right to alter this part of the decree.

I propose, therefore, to your Lordships to dismiss this appeal, and I see no ground for departing from the usual course of giving to the respondents the costs.

Lord BROUGHAM concurred, commending the learning and research of the judges, as shown in their opinions.

It was accordingly ordered, that the appeal be dismissed, and the decree and order appealed from be affirmed, and that the appellants pay to the respondents their costs of the appeal.

DIMES, APPELLANT, v. GRAND JUNCTION CANAL, *et als*,
RESPONDENTS.

[*Decided by the House of Lords, in 1852, the Lord Chancellor, Lord ST. LEONARDS, Lord BROUGHAM, and Lord CAMPBELL, delivering opinions. Reported in 3 House of Lords Cases, 759.*]

A public company, which was incorporated, filed a bill in equity against a land-owner in a matter largely involving the interests of the company. The Lord Chancellor had an interest as a shareholder in the company to the amount of several thousand pounds, a fact which was unknown to the defendant in the suit. The case was heard before the Vice-Chancellor, who granted the relief sought by the company. The Lord Chancellor, on appeal, affirmed the order of the Vice-Chancellor: *Held*, that the Lord Chancellor was disqualified, on the ground of interest, from sitting as judge in the case, and that his decree was, therefore, voidable, and must consequently be reversed: *Held*, also, that the Vice-Chancellor is, under the 53 Geo. 3, ch. 24, a judge subordinate to, but not dependent on, the Lord Chancellor, and that, consequently,

the disqualification of the Lord Chancellor did not affect him; but that his decree might be made the subject of appeal to the House of Lords (a).

The Solicitor-General, *Fitzroy Kelly*, and Mr. *Smythies*, for the appellant (b).

(a) More important points than are involved in this case are seldom brought before a legal tribunal; and adding to its interest is the protracted litigation involved therein. The incidents that gave rise to the suit occurred in the year 1797, and the legal proceedings resulting therefrom were initiated in 1835. Only such facts as have a bearing on the questions of interest which disqualify a judge from sitting in a case, are here reproduced. But the inquiring student will be amply repaid by a careful reading of the entire report, as well as that of *Dimes v. Proprietors of the Grand Junction Canal, et als*, 3 House of Lords Cases, 794, a branch of this same case, and in which its merits are passed upon. The recital of points in the questions submitted to the judges, contain sufficient of the facts in the case to make the opinions of the judges intelligent, and to otherwise make this report a valuable reference on the legal point as to WHAT INTEREST DISQUALIFIES A JUDGE FROM SITTING IN A CASE.

(b) Taking into consideration the extremely interesting character of this case, the rule of not giving the arguments of counsel in this work is so far departed from, as to present in this shape a synopsis of the points made and authorities cited:

In behalf of the appellant it was claimed, that the then late Lord Chancellor COTTENHAM, by whom the case was decided in the Court of Chancery, being a shareholder in the canal company, was thus interested, and incompetent to hear and decide the suit, and that his incompetency affected the Vice-Chancellor, who was his deputy. That, therefore, there was no valid jurisdiction in the case, and the whole proceeding in chancery was incompetent and void. It was claimed that the principle was so held in the case of *The Queen v. The Commissioners for the Paving of Cheltenham*, 1 Queen's Bench Reports, 467, though there the commissioners were only rated to the amount of a few shillings. Viner's Abridgment, Chancery, L., is referred to. In *Egerton v. Derby*, 12 Coke, 114, it was held, "that the Chamberlain of Chester, being sole judge of equity, can not decree any thing wherein himself is party, for he can not be a judge *in propria causa*; but in such case where he is a party, the suit shall be heard in the Chancery *coram Domino Rege*." *The Mayor of Hereford's Case*, 1 Salkeld, 396, was cited. Also, *Brookes v. The Earl of Rivers*, Hardr. 503; *Bridgman v. Holt*, Show. P. C. 111; *The King v. Yarpole*, 4 Term Rep. 71; *Charte v. Kennington*, 2 Str. 1173; *The King v. The Justices of Essex*, 5 Maule & Selwin, 513; 2 Rolle's Abridgment, 92. In an anonymous case, 1 Salkeld, 396, Judge HOLT said, "That the Mayor of Hereford was laid by the heels for sitting in judgment in a case in which he was himself lessor of the plaintiff in ejectment, though by the charter he was sole judge of the court."

The learned solicitors for the appellant quoted 1 Kent's Commentaries, 420, where, after stating that it is a principle of the English law, that the will of the Legislature is the supreme law of the land, and demands proper obedience, he says: "But while we admit this conclusion of the English law, we can not but admire the intrepidity and powerful sense of justice which led Lord COKE, when Chief Justice of the King's Bench, to declare, as he did in *Dr. Bonham's Case*, 8

Mr. *Stuart* and Mr. *Bethell*, for the respondents (a).

QUESTIONS FOR THE CONSIDERATION OF THE JUDGES.

THE Lord Chancellor proposed the following questions for the consideration of the judges:

"A public company, established for constructing a canal, was incorporated, and bought some land for the purpose of making the canal; a person claiming

Coke, 118, that the common law doth control acts of Parliament, and adjudges them void when against common right and reason. The same sense of justice and freedom of opinion led Lord Chief Justice HOBART, in *Day v. Salvadge*, Hobart, 87, to insist that an act of Parliament made against natural equity, as to make a man judge in his own case, was void; and induced Lord Chief Justice HOLT to say, in the case of *The City of London v. Wood*, 12 Mod. 687, that the observation of Lord Coke was not extravagant, but was a very reasonable and true saying."

The following cases were also cited: *The Queen v. The Cheltenham Commissioners*, 1 Queen's Bench, 467; *The King v. The Inhabitants of Rishton*, Id. 479, n.; *The Queen v. The Justices of Hertfordshire*, 6 Queen's Bench, 753; *Esdaile v. Lund*, 12 Mll. & W. 734; *Lord Mostyn v. Spencer*, 6 Beavan, 135. And as to the law in other nations, Justinian's Institutes, Book 4, title 5, law 1; French Code de Procedure Civile, Part 1, Book 2, title 21, art..

(a) It was claimed by the counsel for respondents, that inasmuch as the appeal was brought into the House of Lords by the enrollment or allowance of the Lord Chancellor, if his judgment was a nullity, the appeal was likewise void, and the decision of the Vice-Chancellor would consequently be unaffected. It was also claimed that the Vice-Chancellor was independent of the Lord Chancellor, and the act of Parliament creating the office was cited, 53 Geo. 3, c. 24, sec. 2: "Such Vice-Chancellor shall have full power to hear and determine all causes, matters, and things which shall be at any time depending in the Court of Chancery of England, either as a court of law or as a court of equity, or incident to any ministerial office of the said court, or which have been or shall be submitted to the jurisdiction of the said court, or of the Lord Chancellor, Lord Keeper, or Lords Commissioners for the time being, by the special authority of any act of Parliament, as the Lord Chancellor, etc., shall, from time to time, direct. And all decrees, etc., of the said Vice-Chancellor, shall be deemed and taken to be, as the nature of the case shall require, decrees, etc., of the said Court of Chancery, or of such incident jurisdiction as aforesaid or under such special authority as aforesaid, and shall have force and validity, and be executed accordingly; subject, nevertheless, in every case, to be reversed, discharged, or altered by the Lord Chancellor for the time being; and no such decree or order shall be enrolled until the same shall be signed by the Lord Chancellor, etc., for the time being." Sec. 3. "Such Vice-Chancellor shall sit for the Lord Chancellor, Lord Keeper, or Lords Commissioners, etc., whenever they shall respectively require him so to do; and shall also, at such other times as the Lord Chancellor, etc., shall direct, sit in a separate court, whether the Lord Chancellor, etc., shall be sitting or not; for which purpose the said Lord Chancellor, etc., shall make such orders as to them respectively shall appear to be proper and convenient, from time to time, as occasion may require."

adversely an interest in such land recovered the property by ejectment. The corporation then filed a bill against the claimant, and to have their title confirmed. The Lord Chancellor had an interest as a shareholder in the company to the amount of several thousand pounds, which was unknown to the defendant; and he (the Lord Chancellor) granted the injunction and the relief sought.

"Was this a case in which the order and decree of the Lord Chancellor were void on account of his interest, and of his having decided in his own cause?"

"A public company, established for constructing a canal, was incorporated, and bought some land for the purpose of making a canal; a person claiming adversely an interest in such land recovered the property by ejectment. The corporation then filed a bill against the claimant, and to have their title confirmed.

"The Vice-Chancellor, whose authority is derived under the 53 Geo. 3, cap. 24, granted an injunction, and the relief prayed; and the Lord Chancellor, who had an interest as a shareholder in the company to the amount of several thousand pounds, which was unknown to the defendant, upon an appeal by the defendant, affirmed the orders made by the Vice-Chancellor. The orders were then enrolled, some upon the application of the defendant, and others upon the application of the plaintiff, by the order of the Lord Chancellor.

1. "Were the orders of the Vice-Chancellor void on account of the interest of the Lord Chancellor?"

2. "Were the orders of the Lord Chancellor void on account of his interest, and of his having decided in his own cause?"

OPINION OF THE JUDGES.

Mr. Baron PARKE: In answer to the first question proposed by your Lordships, I have to state the unanimous opinion of the judges, that, in the case suggested, the order or decree of the Lord Chancellor was not absolutely *void* on account of his interest, but *voidable* only.

If this had been a proceeding in an inferior court, one to which a prohibition might go from a court in Westminster Hall, such a prohibition would be granted, pending the proceedings, upon an allegation that the presiding judge of the court was interested in the suit. Whether a prohibition could go to a court of chancery, it is unnecessary to consider.

If no prohibition should be applied for, and in cases where it could not be granted, the proper mode of taking the objection to the interests of the judge would be, in courts of common law, by bringing a writ of error, for error in fact, and assigning that interest as cause of error.

The former course was stated to be proper in the case of *Brooke v. Earl of Rivers*, Hardr. 503, it being suggested that the Earl of Derby, who was Chamberlain of Chester, had an inter-

est in the suit; and the court held that, where the judge had an interest, neither he nor *his deputy* can determine a cause or sit in court; and if he does, a prohibition lies.

The latter course was adopted in the case of *The Company of Mercers and Ironmongers of Chester v. Bowker*, 1 Stra. 639, where it was assigned for error in fact, on the record of a judgment for the Company of Mercers in the Mayor's Court of Chester, that after verdict, and before judgment, one of the Company of Mercers became mayor; and for that reason the judgment was reversed in the Court of Quarter Sessions, and that judgment of reversal affirmed in the King's Bench.

In neither of these cases was the judgment held to be absolutely void. Till prohibition had been granted in one case, or judgment reversed in the other, we think that the proceedings were valid, and the persons acting under the authority of the court would not be liable to be treated as trespassers.

The many cases in which the Court of King's Bench has interfered (and may have gone to a great length), where interested parties have acted as magistrates, and quashed the orders made by the court of which they formed part, afford an analogy.

None of these orders is absolutely void. It would create great confusion and inconvenience if it were. The objection might be one of which the parties acting under these orders might be totally ignorant till the moment of the trial of an action of trespass for the act done; but these orders may be quashed after being removed by *certiorari*, and the court shall do complete justice in that respect.

We think that the order of the Chancellor is not void; but we are of opinion, that as he had such an interest which would have disqualified a witness under the old law, he was disqualified as a judge; that it was a voidable order, and might be questioned and set aside by appeal, or some application to the Court of Chancery, if a prohibition would not lie.

As to the second question, we are of opinion that the Vice-Chancellor, under 53 Geo. 3 c. 24, is not the mere deputy of the Chancellor. We agree that the interest of the principal affects the deputy, on the rule adopted in *Wood v. Corporation of London*, 12 Mod. 669, 686, *et seq.*, and *Brooke v. Earl of Rivers*, Hardr. 503; but we think that the Vice-Chancellor is not a

deputy, but has independent jurisdiction to make decrees, subject to the power of the Chancellor, to be reversed, discharged, or altered by the Chancellor.

We think this is to be deduced from the language of the statute. By the second section, the Vice-Chancellor has full power to hear and determine all matters, causes, and things depending in the Court of Chancery; and all decrees, orders, and acts of such Vice-Chancellor so made or done shall be deemed to be orders and acts of the Court of Chancery, and shall have force and validity, and be executed, subject, nevertheless, in every case, to be reversed, discharged, altered, or allowed; and no decree shall be enrolled until signed by the Lord Chancellor. If the decrees or orders are not reversed by the Lord Chancellor, they, in our opinion, are obligatory, and are in no sense affected by the disqualification of the Lord Chancellor.

But in order to appeal against them to the House of Lords, they must be enrolled; and enrollment can not be made without the Lord Chancellor's signature. In giving that signature, the Chancellor has a discretion which he may exercise. But he may be applied to for that purpose, and if he gives his signature, his interest affords no objection to its validity. For this is a case of necessity, and where that occurs the objection of interest can not prevail. Of this the case in the Year Book, 8 Hen. 6, 19 (2 Roll. Abr. 93), is an instance, where it was held that it was no objection to the jurisdiction of the Common Pleas that an action was brought against all the judges of the Common Pleas, in a case in doubt which could only be brought in that court.

We therefore answer the second question by saying, that the orders of the Vice-Chancellor are neither void nor voidable on account of the interest of the Lord Chancellor. That the orders of the Lord Chancellor are not void, but voidable, and his signature to the order for the purpose of enrollment is neither void nor voidable.

THE LORD CHANCELLOR: In reference to the question upon which her majesty's judges, a few days since, gave their opinion, at the desire of this House, the effect of that opinion, in which I, for one, entirely concur, is, that having regard to the

interest which the late Lord Chancellor had in the Grand Junction Canal Company, his decision must be deemed to be voidable, and that an appeal to this House must be considered, as a proceeding in a court of equity, the proper step to be taken to avoid such a decree. Adopting the opinion of the learned judges in that respect, it will be proper to declare that the orders and decrees appealed against, so far as they were made by the late Lord Chancellor, shall be reversed. Upon that, my noble and learned friends and myself entirely agree.

Upon the other question, upon which I never entertained any doubt—namely, whether the decrees and orders of the Vice-Chancellor could be affected by the circumstance that the Lord Chancellor who affirmed them had an interest in the subject-matter of the suit—the learned judges have given the House a very clear opinion, and in that opinion I entirely concur; it is that which I always entertained. It is impossible to represent, upon the statutable authority given to the Vice-Chancellor, that he is in the situation of a mere deputy, so as to fall within the cases referred to, or to say that therefore any order or decree made by him would be void or voidable, in case the Lord Chancellor himself had an interest in the matter of the suit. There is no warrant for such an opinion in the words of the statute, and I can not conceive any thing more mischievous or absurd than to suppose that an order or decree made by one of the Vice-Chancellors should be void in a case where the Lord Chancellor did not interfere judicially, merely because the Lord Chancellor himself had an interest in the subject of the suit. Lord COTTENHAM thought so differently upon that point, that he called in one of the judges of the court; that judge, no doubt, possessing in some measure an original jurisdiction, but still an inferior judge—he called that judge in to his assistance, to advise him upon the very point now being decided by your Lordships. I apprehend that these decrees of the Vice-Chancellor are good so far as they can be maintained consistently with the rules of equity; and if your Lordships should be of opinion that the case is not made out on the part of the appellant as to the equity he asserts—that is to say, that no relief ought to have been granted to the company as against him—I apprehend you will feel no difficulty in affirming the

orders and decrees of the Vice-Chancellor, and of declaring that they shall be held to be good, and unaffected by any thing which took place as to the affirmance of them or the dealing with them by the Lord Chancellor.

Lord BROUGHAM: There are two branches of this case to which my noble and learned friend has referred. One of them is that which arises upon the first argument of the appellant, upon which your Lordships have taken the opinion of the learned judges; and it is immaterial, as to the result of this case, in which way we dispose of the first question put to the learned judges; namely, whether or not the Lord Chancellor, in respect of his interest, was disqualified from acting as a judge in the cause, and therefore whether his decree was void or voidable. That it was not void, my noble and learned friend on the Woolsack, and my noble and learned friend, Lord CRANWORTH, who is not now here, entertained, during the argument, a very strong opinion. The learned judges consulted have come to a clear opinion upon that subject, and the decree is not void, but only voidable; nevertheless, that it is to be avoided when brought under review, and upon objection taken. But with respect to the second point submitted to them, whether or not the Vice-Chancellor's judgment is void, in respect of the Lord Chancellor's authority being null from the beginning of the whole proceedings in the Court of Chancery, I must say that I never from the beginning had the least doubt, and was therefore very little surprised to find the learned judges declare that the Vice-Chancellor has entirely independent jurisdiction, and is not in any respect dependent upon the Lord Chancellor, from whom he only receives directions as to what cases he shall entertain and dispose of. That by the act is the only connection which subsists between the two branches of the Court of Chancery, with the exception of the final enrollment, which requires the previous signature of the Lord Chancellor; but, as plainly as an enactment can speak, the Vice-Chancellor has a substantive and an independent jurisdiction conferred upon him by the very words of the statute; and it is expressly stated in that statute that his decrees shall be decrees of the Court of Chancery, and shall have execution as such. And then follows the only

connection established between his proceedings and those of the Lord Chancellor, that there shall be no enrollment of a decree, with the view to further proceedings, without the previous signature of the Lord Chancellor; but the giving of that signature can not affect the validity of the Vice-Chancellor's decree. Therefore, my Lords, we have now in the first place to declare, agreeing in opinion with the learned judges, that the interest of the Lord Chancellor rendered his decree voidable, and to declare that the decree is reversed, and we have then to deal with the decree of the Vice-Chancellor.

¶ Lord CAMPBELL: I take exactly the same view of this case as do my noble and learned friends, and I have very little to add to their observations. With respect to the point upon which the learned judges were consulted, I must say that I entirely concur in the advice which they have given to your Lordships. No one can suppose that Lord COTTENHAM could be, in the remotest degree, influenced by the interest that he had in this concern; but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest. Since I have had the honor to be Chief Justice of the Court of Queen's Bench, we have again and again set aside proceedings in inferior tribunals because an individual who had an interest in a cause, took a part in the decision. And it will have a most salutary influence on these tribunals when it is known that this high Court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was, on that account, a decree not according to law, and was set aside. This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of laboring under such an influence. It is quite clear, likewise, I believe, that the orders of the Vice-Chancellor can not be in the slightest degree affected by what the Lord Chancellor has done, nor can it be maintained that the Vice-Chancellor was acting merely as the Lord Chancellor's deputy when these orders and decrees were pronounced.

The Lord Chancellor's decree and orders were reversed, and those of the Vice-Chancellor confirmed (a).

(a) WHERE TRUSTEES HAVE A PERSONAL INTEREST.—*Tyrrell v. Bank of London*, 10 House of Lords Cases, 26: T, a solicitor, had a private arrangement with R, by which he was to receive from R a share in certain property then belonging to R, and to share the profit to be obtained from the sale of that property. In his character of solicitor, T acted for clients (a banking company) in the purchase of the larger portion of that property, never communicating to his clients the fact of his having an interest in it: *Held*, affirming the decree of the court below, that T was to be treated as a trustee for his clients in respect of his share of so much of the property as they had actually purchased; but a part of the decree, which had declared him to hold the unsold property also in trust for his clients, was varied; and instead thereof, the value of T's half of that property was directed to be taken into account in ascertaining what was due from him to his clients. He having made a large profit on the sale, was ordered to pay back the amount of this profit, with the full amount of interest given in cases of a breach of trust; namely, five per cent.

Imperial Mercantile Credit Association v. Coleman, 6 Chancery Appeals, 558: By the articles of association of a financial company, it was provided that a director should vacate his office if he participated in the profits of any work done for the company without declaring his interest at a meeting of the directors. A director having undertaken to obtain money for certain railway debentures at five per cent commission, offered them to the company at one and a half per cent commission. The offer came before a committee of directors, of which he was not a member, and they recommended the board to accept the offer. The recommendation came before a meeting of the directors, at which the director making the offer was present. He stated that he was interested in the matter, and proposed to retire, but was told by the chairman that it was unnecessary, and the offer was accepted by the board. The director appeared to have previously given full information to the two managers of the company as to his interest in the debentures: *Held* (reversing the decree of MALINS, Vice-Chancellor), that, according to the articles of association, it was contemplated that a director might have an interest in business brought by him to the company; and that, under the circumstances, this director could retain the difference between one and a half per cent and five per cent commission.

COURT OF APPEALS OF KENTUCKY.

WINTER TERM, 1873.

HON. M. R. HARDIN, CHIEF JUSTICE.	
HON. B. J. PETERS,	} JUDGES.
HON. WILLIAM LINDSAY,	
HON. WILLIAM S. PRYOR,	

THE COVINGTON AND LEXINGTON RAILROAD CO., APPELLANT,
versus

JAMES WINSLOW, JOHN A. STEVENS, CHARLES N. FEARING,
ELI C. BALDWIN, Administrator of ROBERT B. BOWLER, deceased,
SUSAN L. BOWLER, widow, GEORGE P. BOWLER, ROBERT B. BOWLER,
and LOUISA BOWLER, JOHN T. LEVIS, RICHARD STOWERS,
JAMES C. GEDGE, WILLIAM ERNST, JOHN W. STEVENSON,
A. HATHAWAY, THOMAS H. KENNEDY, and JAMES C. GEDGE,
Administrators of W. H. GEDGE, deceased, FRED. C. GEDGE,
LEWELLYN GEDGE, BURTON H. GEDGE, MARY H. GEDGE,
MARY H. GEDGE, JR., GEORGE C. DODGE, JR., LAURA H. DODGE,
WILLIAM B. GEDGE, and CLARA B. GEDGE, APPELLEES.

1. JURISDICTION.—Where a judicial sale made by the Fayette Circuit Court, and the supervision of the property sold is retained by the Court for the purpose of carrying out the terms of the sale, the Kenton Circuit Court has jurisdiction in an original action to charge the purchaser of such property as trustee for the original owners. Neither Court will be required to subordinate itself to the other.
2. LIMITATION OF ACTIONS.—Where the petition alleges breaches of trust, whereby the trust property (a railroad) is sold, and one of the directors becomes the purchaser, and the prayer is that such purchase be annulled, the property be declared to be held in trust, and adjudged to be reconveyed to the beneficiary, and for an account, the suit is not for the recovery of real estate, as contemplated by sec. 2, art. 1, ch. 63, 2 Rev. Stat. 123, or for relief on the ground of fraud; but is a suit to declare and enforce an implied or constructive trust, and is barred in five years.
3. In such case, the purchaser having deceased within five years from the time of his purchase, and the suit brought within one year after letters of

administration were taken out on his estate, the suit is within the time limited by the statute. Sec. 5, art. 4, ch. 63, 2 Rev. Stat. 132.

4. **TRUSTEES.**—A director is a trustee for the corporation, and it being his duty to act in good faith toward his beneficiary, it is a breach of trust on his part to create any relation between himself and the trust property, whereby it becomes his interest to subserve his individual interests at the expense or to the injury of such beneficiary, or the trust-property.
5. **PURCHASE OF TRUST ESTATE BY TRUSTEE.**—Where the director purchases the trust property at a judicial sale thereof, he takes and holds the property in trust for the corporation. Such person will not be allowed to purchase and make profit out of the estate of those to whom he occupies such a confidential relation.
6. Where a majority of directors place themselves in a position of hostility to the interest of the trust, such majority incapacitate themselves for doing a valid act, whereby the corporation would be bound in regard to such interests, and deprive the minority of the legal power of acting in regard thereto.
7. **BREACHES OF TRUST CONSIDERED.**—In this case, diverting the means of the road from paying interest on preferred-mortgage claims in suit, and for default in which a sale is ordered, to making improvements on the road which might have been dispensed with, or deferred, evidences an intention to bring the road to sale.
8. It is not a good defense on the part of the principal in such and similar transactions, that his co-directors participated therein and approved the same, because it is not denied that he exercised over such co-directors a controlling influence. From the time he concluded to prepare for the purchase of the road, his personal interests became antagonistic to that of the corporation, and he ought to have ceased to act as a director.
9. **ACQUIESCENCE.**—The rejection of a proposition made through the columns of a newspaper, to which conditions are attached which the beneficiary is neither legally nor morally bound to accept, does not raise the presumption of acquiescence. Under the circumstances in this case, the corporation had the right to have its property delivered to it by placing the holder in *statu quo*.
10. The offer to restore in this case distinguished from that in *Roach v. Hudson*, 8 Bush, 410 (reproduced herein, pages 418, 550), wherein the offer of restoration was held to be reasonable, and the refusal to accept the same held binding.
11. Merely remaining passive does not deprive a party of the right to seek relief, unless, in addition thereto, he does some act to induce or encourage others to expend their money or alter their condition, and thereby renders it unconscientious for him to enforce his claim. "No such act upon the part of the company is shown in this case."
12. **NECESSARY PARTIES.**—In this case, notwithstanding the conveyance in trust, the relation of trustee for the corporation continued in the original purchaser, the director, and his representatives should be made a party in a suit to establish a claim against the trust property; and the suit being also for the recovery of the property itself, the beneficiaries under the conveyance in trust are also necessary parties in the suit.

13. **PRACTICE—ESTOPPEL.**—In such case, where the purchaser at the judicial sale claims a vendible interest in the property, and executes a conveyance thereof, in trust, the holders themselves recognize such power by purchasing such interest; and being held in trust, the beneficiary can call upon a court of equity to declare the same, and compel a relinquishment of the claim thereto.
14. Where the title held is a naked trust, with only a limited power to convey, and the management rests with the beneficiaries, the heirs of a deceased beneficiary are necessary parties in a suit to establish the implied trust arising from the directorship and purchase during its continuance.
15. **ESTOPPEL.**—Where directors fail to interpose an equitable defense in a suit against the corporation, such failure can not protect one of the faithless directors in his profits realized by such breach of official duty.
16. **WHERE STOCKHOLDERS ARE ESTOPPED.**—Individual stockholders, being admitted as parties in a suit wherein the corporation is also a party, and filing pleadings therein, act for themselves only, and not for the corporation; and the latter is not bound or estopped by the action of the court thereon, although they may have set up the same acts as grounds for relief that are afterward relied upon by the corporation.
17. **INSOLVENCY.**—If an insolvent corporation should become a bidder for its own property at a judicial sale, and comply with the terms thereof, it would in such case become the purchaser; and there is no valid reason to deprive it of the right to charge its trustee as such purchaser, and he can not set up the insolvency of his beneficiary as a defense.
18. In this case it is the duty of the appellant to pay its debts; and if this can not be done, still it is its duty to require possession of the road, that it may be again sold for the benefit of creditors whose debts have not been paid. The appellees have no right to demand a resale; but the creditors have the right so to do, in a proper tribunal, in default of the payment of their just claims.
19. **INNOCENT PURCHASERS.**—Where a special warranty of title is taken by the grantee under such circumstances as imply knowledge that the property was held in trust, the grantee is not an innocent purchaser entitled to hold against a beneficiary of the grantor.
20. **GRANTOR AND GRANTEE.**—When the grantee has knowledge that the grantor was a director in the corporation of the beneficiary at the time he acquired the property, the latter is put upon inquiry as to the character of the title to the property which the director thus acquired.
21. **THE MANDATE** (which follows, page 596) prescribed the terms of settlement between the parties, namely:
 1. Appellant is entitled to the gross earnings of the road from the time it was taken control of by the Fayette Circuit Court until surrendered, with interest from the end of each year, with judgment therefor if the balance is in favor of appellees, after giving credit for these items:
 2. All payments by appellees on account of the debts of the company. All sums expended in keeping up the road, rolling stock, and machinery, together with permanent improvements. Expenses of running the road, and compensation of directors, superintendents, and other *employés*.A judgment to follow in favor of the party having the balance in its favor.

THIS cause was brought to the Court of Appeals by an Appeal from the Kenton Circuit Court, wherein the petition of the plaintiffs, the Railroad Company, was dismissed on the rulings of Hon. JOHN W. MENZIES, Special Judge, Hon. JAMES O'HARA, Circuit Judge, being of counsel in the case for defendants.

THE ORIGINAL PETITION

Was filed on the 30th of September, 1865 (a), and recited the organization of the company, and the construction of its road, from the city of Covington southerly as far as Paris, eighty and a quarter miles, and the procurement of the right of way, and the grading thereof from thence to Lexington, eighteen miles. That the capital stock subscribed amounted to \$1,392,400, all of which was paid up except \$53,113.77, which was paid in part; and that of this stock Covington took \$300,000, and indorsed the bonds of the company to the amount of \$200,000, which said city has to pay, principal and interest; and that the county of Pendleton took \$50,000 stock, the county of Bourbon \$100,000, and the county of Fayette \$200,000, all of which, including that of Covington, was paid in full. That the balance of the stock was subscribed and paid for by individuals, except to the amount of \$200,000, held by the city of Cincinnati, as security for a loan of \$100,000. That said road, from time to time, was provided with depot-houses, engines, rolling stock, etc., and after the completion of the road to Paris, other roads were leased and run by the company, thus making a continuous line of railway to Lexington and Nicholasville; and that by means thereof, the company received sufficient income to pay all current running expenses, of keeping the same in repair and

(a) A certificate of the Clerk of the Kenton Circuit Court, attached to the printed record of the case, says the petition was sworn to by "one of the attorneys for the plaintiff, on the 23d day of March, *with the date of the year torn off.*" It was claimed by appellant's counsel, that the petition had been prepared for filing in the month of March, 1865, and was not then filed, because administration on Mr. Bowler's estate was first taken out in Kentucky, on the 13th of February, 1865, and that suit could not be brought within six months thereafter, under the first section of the act of February 27, 1865, providing, "No suit or action, except suits and actions to settle up the estate of decedents, shall be commenced against any personal representatives until six months after administration shall have been first granted upon said estate by the Courts of this Commonwealth."—*Supplement to the Revised Statutes of Kentucky*, page 222.

stocked, and all accruing interest on its indebtedness, and sufficient besides to create a sinking fund to pay off the indebtedness.

The petition set forth the issuing by the company of \$400,000 of first mortgage bonds to Stevens and Fearing, trustees; also, of \$1,000,000 of second mortgage bonds to James Winslow, trustee; and of \$600,000 of third mortgage bonds to the same trustee. That previous to the issuing of the third mortgage bonds, M. M. Benton, President; Samuel J. Walker, Treasurer; John B. Casey, Charles A. Withers, A. Robbins, F. G. Gedge, and John T. Levis, Directors, had become liable, as indorsers, etc., for the company, to an alleged amount of \$550,000; and the company had, by its said President, executed and delivered to them an indemnifying mortgage on the road. But that subsequently, the \$600,000 of third mortgage bonds were delivered to Benton, Casey, and Levis, trustees, for the same purpose, and, by agreement of the parties in interest, the prior lien of the "Director's Mortgage," so called, was waived in favor of the said third mortgage bonds. That these bonds were by said trustees sold to James W. Walker at 50 cents on the dollar, in consideration whereof, he agreed to pay off \$300,000 of the "Director's debt," so called, being the liabilities as indorsers, etc. This was to be done in about equal annual payments in five years, and ample security was given "for the performance of said contract on his part; that from thenceforward said parties were amply secured against said responsibilities, and the said Walker fully performed his part of said agreement, before the time stipulated therein; and the balance of said liabilities of Benton, Levis, Casey, and others for the plaintiff, remaining after the execution of said contract, on the 13th day of December, 1855, were soon thereafter paid off by the company, and the parties released therefrom."

The petition further stated, that Robert B. Bowler, who died on the 4th of July, 1864, became a stockholder, and was elected a director in December, 1857; that Bowler became a director with the view of looking after his interests as a creditor, and not as a stockholder, as such interest was merely nominal in comparison with his interest as a bondholder. Said Bowler was re-elected a director in December, 1858, and was, from the moment of his first election, "from his known capacity as a man

of business, financial ability, and reputed wealth, a leading member of the Board of Directors;" that he used his influence with the other members of said Board, with the view to embarrass said company and injure its credit, and bring about a sale of the road; and mainly through his influence, a circular, known as the "\$800,000 circular," was issued and sent to bondholders; and, mainly through his influence, the directors ceased making efforts to pay the interest on the bonds, which alarmed the creditors, and caused a suit to be brought in this Court for the foreclosure of said second mortgage. That in said suit there were no other creditors pressing for payment, except for the interest on the second mortgage bonds, and if it had been paid, no sale would have taken place. That the "\$800,000 circular," otherwise called "Proposition to Bondholders," alleged that it would require near that sum to put the road in complete condition, although the reports of the Superintendent for the years 1857 and 1858 showed that no such expenditures were then advisable or necessary; "and WILLIAM H. CLEMENT, a practical engineer and railroad officer of great experience, being then called upon by the officers of the road, estimated the amount necessary to complete the road, renewal of bridges, etc., at from \$131,840 to \$206,715, and other competent persons, experienced in railroad management, agreed in substance therewith; and although the said 'Proposition to Bondholders' named 'nearly \$800,000' as necessary to 'complete' the road, Bowler, and those acting with him, gave out to the creditors substantially, that near that amount was then necessary to be expended on the road, and proceeded to carry out the terms of said 'Proposition' by stopping the payment of interest." That after the leasing of the road between Paris and Lexington, it was not contemplated to finish the road "between said places, and neither the alleged estimates in said 'Proposition,' or of CLEMENT, proposed any expenditures therefor. And plaintiff now avers, that said Bowler, and those acting with him, knew that the proposed expenditures mentioned in the 'Proposition to Bondholders,' were unnecessary at that time. That the said 'Proposition' was given circulation by him and those acting with him, for the purpose of embarrassing the affairs of the plaintiff, and bringing the road to sale, so that he might become the purchaser thereof, or

to affect the value of the securities of the road, so as to enable him to make large profits by buying up the same at low prices, or for both, and all such purposes. That said Bowler, and those acting with him, could have prevented the sale of the road, by leasing the same, or by themselves managing the same in the interest of the stockholders; but said Bowler neither desired to prevent the sale of the road nor to manage the road in the interest of the stockholders or for their benefit." Afterward, the interest on the second mortgage bonds was not paid or provided for by the directors. The combined effect of the circular and non-payment of the interest broke down the credit of the company, and greatly depreciated its securities. Said Bowler then entered the market and purchased, at a heavy discount, a large amount of the second and third mortgage bonds.

The petition further alleged, that the earnings of the road in the year 1858 were \$437,579.02, and after applying \$239,262.22 to operating and repairing the road, left \$198,316.80 for payment of interest, construction, etc. That for eleven months and five days next following the 1st of November, 1858, the earnings were \$458,820.99, which, after applying \$231,086.22 to current running expenses, repairs, and stocking the road, left \$227,734.77 for payment of interest, etc.; "but instead of applying so much of the net earnings of the road to the interest upon the second mortgage bonds, to prevent a forfeiture thereof, it was, mainly through the agency and influence of said Bowler, unnecessarily and wrongfully applied to put the road in better order than was strictly necessary, in purchasing rolling stock and real estate unnecessary for the road, and still remaining unused for that purpose, and paying claims not pressing the company, and by the wrongful application of the means of said road aforesaid, permitted a forfeiture of two of said mortgages by non-payment of the interest." That in consequence of the failure to pay the interest on the second mortgage bonds, suit was brought in the Fayette Circuit Court, Kentucky, by the trustee of the bondholders, to foreclose the second mortgage, and in August, 1859, a judgment of foreclosure was suffered to be entered for a sale of the road, and on the 5th of October following, the commissioner of said court accordingly sold the road, part of its franchises, and the same was bid off, at a price largely less than its full

value, by William H. Gedge, for said Bowler, they being, at the time, directors of the company. That the bid was \$2,125,000, but by the terms of the judgment he was only required to pay the unpaid interest, and to keep down the accruing interest on the amount of the indebtedness of the road covered by his bid, and to pay off the bonds thereof to said amount as they matured, so that he really paid only a small amount from his own means. That Bowler took possession of the road, and derived large profits therefrom, but did not complete any or only inconsiderable parts of the improvements on the road as stated to be necessary in said circular, and the said road, when sold, was in as good condition, if not better, than it was at the time of filing the petition, or at any time after the sale and previous thereto; and that after paying interest on the bonded debt, and making the investments required by the court, he applied the surplus profits to his own uses and purposes. That in the year 1860, such individual profits amounted to the sum of \$80,000 or upward; and in the following year said Bowler also derived large profits therefrom, the actual amount of which plaintiff is unable to state, because since Bowler took possession of said road aforesaid, he, or those associated with him, had not published any account of the earnings of the road, as had been done previous to that time. That on the 1st of January, 1861, said Bowler constituted a joint-stock company, and subject to the mortgage securities ordered to be paid by the terms of said alleged sale, amounting to \$1,737,000, divided the interest he claimed in the road into 11,000 shares at \$100 per share, and transferred the road to said joint-stock company for the sum of \$2,837,000, or at a profit of \$712,000 over and above the amount of his alleged purchase of the said road. That in said company John T. Levis took twenty shares at \$100 per share; William H. Gedge took twenty shares at the same price; James C. Gedge took twenty shares at the same price; Richard Stowers took twenty shares at the same price, and the said Bowler retained the balance of the stock at the same relative price. That said William H. Gedge and John T. Levis were directors of said road at the time of issuing of said circular as aforesaid, and when said road was brought to sale as aforesaid, and at the time of the alleged sale. And Richard Stowers was a director, elected on the 15th

of December, 1859, and was such director at the time of taking such shares, and so continued to be at the filing of the petition. That none of said parties paid any consideration for the said stock, and that at the time of accepting such stock they and each of them had full knowledge of the equities of the plaintiff as herein set forth. That in the year 1862, the said company divided a dividend from net earnings, being the profits at six per cent on the said stock, of \$1,100,000. Subsequently, on the 1st of January, 1863, said Bowler and Susan L. Bowler, his wife, conveyed the said railroad to William Ernst and Q. A. Keith in trust for the parties aforesaid (except the said John T. Levis, who withdrew), and A. Hathaway, John W. Stevenson, and Wm. Ernst, according to certain interests of said parties, by them respectively held, or contemplated to be held, by said parties. That at that time the road was as valuable, if not more valuable, than at the time of the formation of said joint-stock company; and the said parties had full notice and knowledge of the equities and claims of plaintiff to said property, and took ample security for payments by them made on account of their several interests (if they did make any such advances); and plaintiff charged that portions of the alleged considerations for such conveyance were not made as alleged therein. That the said parties and said Bowler, and since his death his estate, have made and derived large profits from the running of said road and the earnings thereof. That the amount of the earnings of the road, for the year 1859, were not made known prior to the annual report on the 15th of December, 1859, and that the several frauds and maladministrations of Bowler, were not discovered by or known to plaintiff until the month of January, 1865, or about that time. That up to the time of the election of directors, in December, 1859, the directory of the road was under the influence of Bowler, and the stockholders could not make any effectual opposition to said sale or prevent the same, and that it was the duty of the directors of the road to so manage the road and its means as to prevent a sacrifice of the property of the plaintiff, and not shift their duties or liabilities upon individual stockholders, who had no power to control the road or its means. That the said Robert B. Bowler was a non-resident of the State, and that he died on the 4th of July, 1864,

intestate, in the county of Hamilton, State of Ohio, where he resided. That administration on his estate had been granted in Kenton County, to Eli C. Baldwin, on the 13th of February, 1865. That he left a widow and children, naming them, also resident in Ohio. That on the 15th of December, 1859, the stockholders, at their annual meeting, elected Joseph Shawhan, Alexander L. Greer, Brutus J. Clay, C. D. Carr, George H. Perrin, Richard Stowers, E. T. Clarkson, Peter Zinn, and William Lisle, Directors; and the Board elected Jos. Shawhan, President, and A. L. Greer, Vice-President; and part of the said persons (with others who have been chosen directors in place of some who have ceased to be directors), were then the directors of said corporation, and were a body corporate by the name of the Covington and Lexington Railroad Company.

Plaintiff prayed that the purchase by Bowler of said property, under the order of the Fayette Circuit Court as aforesaid, might be set aside and adjudged null and void, or held to inure to the benefit of the plaintiff, and all conveyances, or rights acquired under the same, declared null and void, or held to inure as aforesaid. That the heirs and legal representatives of said Bowler might be held to account for the profits made on the bonds of said road, bought up by said Bowler while he was a director, with the intention of bringing the same to sale or making profit thereon, or that were purchased after the said sale for the purpose of preventing action for the recovery of the road; and if said account is not ordered, then that the estate of said deceased, on final settlement, be allowed only the actual costs of such bonds, and not the full amount thereof. That said Bowler's representatives, or those claiming under him or them, might be held as trustees for plaintiff, and that the plaintiff might be subrogated to all claims of said Bowler, his heirs, representatives, and assigns, or those claiming under them; and that an account might be taken of the earnings of the road since the same passed into the possession of Bowler; and that defendants might be required to account for the earnings of the road, and also for loss and deterioration of property. That the road, and every thing belonging to, or connected therewith, should be surrendered to plaintiff, and that the plaintiff might be restored to all it had lost by reason of said sale. And

if, upon a hearing, it should be deemed necessary to order a resale, or that any terms should be imposed before setting aside the sale, plaintiff made tender, in either case, to comply therewith. And plaintiff also prayed for general relief (a).

The defendants, resident in Kentucky, were served with process; and as to those non-resident, the widow and heirs of Bowler, together with the trustees of the first, second, and third mortgage bonds, a warning order was issued, and CHARLES H. FISK, Esq., was appointed attorney to defend for them.

On the 4th of January, 1867, the administrator of Bowler made and filed an affidavit, setting forth the sale under the judgment of the Fayette Circuit Court, and alleging that thereby all rights and franchises of the plaintiff had passed, and the corporation became extinct. On this a rule issued to plaintiff's attorneys, requiring them to show by what authority the suit was brought. A response was filed; and at the December term following, Hon. JOSEPH DONIPHAN, then presiding judge, delivered his judgment, that the sale did not extinguish the corporation, and that the plaintiff had the right to "inquire into the conduct of the former officers of the company." That an individual could

(a) The Articles of Association of the Joint Stock Company, together with the Declaration of Trust, and Deed of Trust to Ernst and Keith, referred to in the Petition, and as recorded in the records of Kenton County, were made Exhibits thereto. The Deed of Trust bears date the 30th of January, 1863, and recites the receipt by Bowler of \$36,000 from A. Hathaway for Q. A. Keith, \$24,000 from W. H. and J. C. Gedge, \$24,000 from Wm. Ernst, \$24,000 from John W. Stevenson, and \$2,000 from Richard Stowers, and the formation by them of a joint-stock company, to be known as the "Kentucky Central Railroad Company." They assumed to pay the balance due on the purchase of the road and perform Bowler's obligations relating thereto, and he covenanted to repay to the parties the principal and interest of the moneys so advanced, if the road was taken from the company by other means than the failure to meet the assumption aforesaid; but said parties released his general estate from any liability therefor, and were to look for indemnity to Bowler's interest in the road alone.

The "\$800,000 circular," or "Proposition to Bondholders," was also made an Exhibit; and as much importance was given to it by counsel on both sides, it will be found in full in an *Abstract of the Minutes of the Board of Directors*, extracts from which Minutes were offered in evidence by both parties.

A *Transcript of the Proceedings in the Foreclosure Suit*, in the Fayette Circuit Court, up to and including the confirmation of the sale, was also made an Exhibit to the Petition.

maintain a similar suit, and consequently a corporation could do the same; and the defendants were required to answer.

Further delay ensued, in rulings and discussions as to what part of the record of the proceedings in the Fayette Circuit Court (wherein the sale was made) should be filed by the plaintiff, as an exhibit to its petition. And finally, on the last day allowed by the court therefor, the 20th of November, 1868, the defendants, Q. A. Keith, A. Hathaway, Wm. Ernst, John W. Stevenson, Eli C. Baldwin, as administrators of Robert B. Bowler, and Jas. C. Gedge, filed a demurrer to the petition, and alleged as causes of demurrer, 1. That the court had no jurisdiction of the action; 2 and 3. Defect of parties plaintiff and defendants; 4. Want of capacity in plaintiff to sue; and, 5. That the petition did not state a good cause of action. This demurrer was overruled by Hon. JOHN W. MENZIES, Special Judge.

On the same day, the same parties filed an answer, occupying twenty-nine pages of the printed record.

ABSTRACT OF DEFENDANTS' ANSWER.

PARAGRAPH I. Set up the foreclosure proceedings in the Fayette Circuit Court, and alleged that plaintiff took no appeal therefrom, but submitted to the judgment of said Court, and that thereby the road and all its franchises were sold to Bowler, and the sale confirmed; and that the defendants were then running the road under the supervision of said Court, under its authority, and under the terms of the sale and confirmation, the material part of which is contained in this extract therefrom:

"This Court reserves full power, by summary proceedings against the purchaser to enforce the compliance with all the terms of sale, and until full payment therefor, to coerce said purchaser to keep all the property purchased in good repair and order, so as to do the business of the railroad with safety and dispatch; and in case of default on the part of the purchaser in making payment, or in complying with any of the terms of sale, or in keeping the property in good order and repair, may appoint a reviewer or order a sale thereof; and it is hereby ordered that there shall be a lien upon all the property, rights, and franchises sold, and upon all the income accruing therefrom, for a full and complete compliance with the terms of said sale."

That the Fayette Circuit Court was then, from term to term, enforcing the terms of said judgment; and for that purpose held

the road in trust; and that, therefore, the Kenton Circuit Court had no jurisdiction of the case, but that such jurisdiction, if any, was in the Fayette Circuit Court.

PAR. II. After reciting the matters set forth in the preceding paragraph, it is plead that the "plaintiff is barred and estopped by the record and judgment of the Fayette Circuit Court, and by the order in said cause confirming the sale of said road to Bowler," and that the same could not be questioned in any court.

PAR. III. This paragraph is quite lengthy, and puts in issue most of the material allegations of the petition which set forth causes for equitable relief. The defendants denied that the road was finished to Paris, and averred that it needed ballasting at the time of the sale. They averred that the annual reports of 1857 and 1858 stated that the income of the road was insufficient to run and stock the road, keep it in repair, and pay interest on its indebtedness, and that these reports were unanimously adopted by the stockholders of the company. They denied the allegations as to the purpose of Bowler in becoming a director, as well as his intentions and purposes in purchasing the bonds of the company, but averred his right so to do; denied his ever using his influence to embarrass the company or to destroy its credit, or to bring it to sale, or that the "\$800,000 circular" was issued mainly through his influence, and that it broke down the credit of the company. They aver that it was the "most feasible and proper" plan to enable the company to complete, repair, and equip the road; and that it was adopted with no other view on the part of Bowler than set forth in the circular itself. That the bonds were payable to bearer, and those purchased by Bowler were not purchased from the company, but from other parties; and if so bought at heavy discounts, he had a right so to do. That after the foreclosure suit was commenced, Bowler exerted himself to "defend the action and resist a judgment for the sale." That Bowler, in good faith, believed the "\$800,000 circular" the only feasible plan to relieve the road from its embarrassments, and as evidence thereof, made an exhibit of a letter written by him to T. D. Carneal, and published in the *Cincinnati Gazette*, August 28,

1858 (a). That the action of the directors in ceasing to pay interest on the \$200,000 guaranteed by the city of Covington, \$50,000 of the bonds of Pendleton County, \$100,000 issued to the city of Cincinnati; and \$520,500 income bonds, on the 13th of November, 1857, was reported to the stockholders, and unanimously approved by them; as was also the suspension of interest on the second and third mortgage bonds likewise reported and approved: And defendants aver that the plaintiff is estopped thereby. Defendants aver that the annual interest accruing in 1857, 1858, and 1859, was \$213,750 per annum; that it had not been paid for some time, and at the time of the sale of the road the debt due and maturing within a few months amounted to \$1,000,000 and upward; and denied that any part of the earnings of the road were applied to unnecessary improvements thereon, or to the payment of claims not pressing on the company. They denied that the interest on the second mortgage bonds alone was pressing for payment; that Bowler was chargeable as a trustee in making the purchase of the road; and averred that he was a large creditor, and had the right to purchase the road to protect himself. That notwithstanding he bought the road for himself, he offered to return it to the company, and neither the stockholders or the plaintiff would

(a) A writer in the *Frankfort Commonwealth*, signing himself "One of the Bondholders," had taken exception to the terms of the circular; and Mr. Bowler's letter purported to be a defense thereof. Among other statements, he says: "The Report of 1857 shows that the road finished to Paris, according to the estimates" of R. M. Shoemaker, engineer, and under him, "cost \$2,816.938, or \$35,211 per mile, differing from the estimate only \$170 per mile. Even this estimate was too low, for it is a notorious fact that not a contractor on the road made any thing, while a large majority sustained heavy loss." "This road, from the time of its opening, has steadily increased each year. It was open to Lexington in December, 1855. The [net] earnings for the year were \$138,694; the increase the next year was \$40,248, and in 1857, last year, the increase over this was \$26,460; and the superintendent tells you, had the company the equipment to do the business, the increase would have been greater than the preceding year. As fast as it could add to its equipment in its crippled condition, it has done so, and the receipts show the advantage of every additional car; and up to this time, when nearly every road in the United States continues to fall off, this road not only maintains its earnings, but shows a gradual increase."

Speaking of the directors, Mr. Bowler says: "As the immediate representatives of the stockholders, they will make every exertion to preserve for them and their posterity this valuable property, at the same time not losing sight of the interest of the bondholders."

accept his offer. They denied that the improvement of the road was stopped after its sale, and aver that \$1,000,000 has been so applied. They deny the statements of the petition as to profits made by Bowler and the defendants, in sales of interests in the road or otherwise; and that the directory in 1859, or previously, was under the influence of Bowler.

PAR. IV. Defendants denied that any frauds of Bowler ever existed, or that any alleged frauds were not discovered until January, 1865. They averred that the stockholders had knowledge, at all times, of all that had been done previous and after the sale; and that at the annual meeting on the 22d of December, 1859, they had knowledge that Bowler claimed the road absolutely as his own; and therefore plead that no cause of action had accrued to the plaintiff five years next before the institution of the suit, and that the same was barred under sec. 2, art. 3, ch. 63, of the Revised Statutes of Kentucky.

PAR. V. Defendants averred that Bowler took possession of the road in October, 1859, as and for his own, and that he and the defendants, claiming under him, have since had exclusive adverse possession thereof; and therefore they plead in bar the same section referred to in the previous paragraph, which they aver "declares that action for the recovery of specific personal property, or for profit therein, or damage for withholding the same, shall commence within five years after the cause of action accrued, and not afterward."

PAR. VI. In this paragraph it was averred that the alleged grievances set up in the petition were all known to the plaintiff previous to the judgment for sale ordered in the Fayette Circuit Court; that the plaintiff was a party thereto, and did not set up the same therein, and that by reason thereof "the plaintiff is barred and estopped to set up said several matters in this action."

PAR. VII. Defendants, Ernst, Hathaway, James C. Gedge, and Stevenson, set up that they are innocent purchasers, for a valuable consideration, of near one-half of the railroad from Bowler; that they knew nothing of the alleged frauds charged against him, and deny that their interests can be affected by any suit against, or frauds committed by him.

PAR. VIII. General plea of statute of limitations of five years.

PAR. IX. In this paragraph it is averred "that the plaintiff, at the time of the sale to Bowler aforementioned, was utterly insolvent;" and after producing statistics in proof thereof, it is further alleged "that plaintiff, being dissolved and dead," had no "legal or equitable right or interest that enables them to maintain this suit.

PAR. X. This paragraph sets forth that the plaintiff is not a corporation, and can not sue. It raises the same point passed upon by Judge DONIPHAN.

PAR. XI. This is a general *résumé* of all the defenses set forth in the previous paragraphs, raising questions of fact. It was drawn, and no doubt intended, to cover every point of defense that might have been overlooked in the preceding ten paragraphs.

The plaintiff demurred to Paragraphs I, II, IV, V, VI, VIII, and IX, of this Answer, and for causes of demurrer averred "that neither of said paragraphs, severally or jointly, or any part or parts thereof, constituted a good or sufficient defense to bar the action of the plaintiff, or to the relief asked for in the petition." After an extended argument by counsel on both sides, this demurrer was sustained, except as to Paragraph VIII, as to which it was overruled.

On the 23d of March, 1870, a FIRST AMENDED ANSWER was filed by the defendants. This answer was a restating of the matters set forth in Paragraphs I and II, and adding thereto, as an exhibit, a large printed volume of 820 octavo pages, containing the entire proceedings, testimony, and exhibits in the Foreclosure Suit, and all other actions growing out of the same, one of which alone, that of *Vallette v. Bowler*, occupying two-thirds of this volume. Plaintiff filed exceptions to this Exhibit; and that part subsequent in date to the confirmation of the sale of the road was ruled out by the court. This left the proceedings on foreclosure only.

On the 20th of September, 1870, defendants filed a SECOND AMENDED ANSWER, and filed therewith, as a part thereof, a Card of R. B. Bowler, published in the *Cincinnati Gazette* of November 10, 1859, "offering to return the road to the stockholders upon being reimbursed his outlay, and relieved from his

bonds in the Fayette Circuit Court." Also, his Card published in the same paper, "December 17, 1859, calling the attention of the stockholders of said company to his former proposition to return said road to them, and requiring an acceptance or rejection of his offer on or before the annual meeting of the stockholders of said company, to be held in the city of Covington, Kentucky, on the 22d of December, 1859." It was averred that these offers to return the road were refused by the stockholders, and therefore the defendants prayed that plaintiff's petition should be dismissed (a).

(a) Each of said Cards was addressed to the "*Editors of the Gazette.*" The first one is lengthy, and all in it having any reference to the restoration of the road to the stockholders is embraced in this extract:

"I shall be happy to restore the road again to the stockholders. First appoint this committee [to investigate], have a rigid and fair examination, and see if I obtained it with any of their money. When satisfied I did not, let the same committee examine my books and vouchers, and see what I really did give for the securities of the company, then reimburse me for the capital, with six per cent interest, relieve me from the securities before the court, and take the property. If they won't do this, I beg that they will permit me to dispose of it as I please.

"R. B. BOWLER."

SECOND CARD OF R. B. BOWLER.

Editors Gazette,—Do you not think that you, and those stockholders you represent, have in your article of yesterday done me injustice? If they do not intend to accept my offer, it is unfair to make insinuations. My proposition is plain and distinct. They are not required to pay what I or my books state to be the cost of the securities, but for the vouchers which I produce, and these with only six per cent interest. This remark was appended to the original offer: "If they won't do this, I beg that they will permit me to dispose of it as I please." Now, all that I ask is, that they do one or the other, and that speedily. I do not care which, as I can not hold such a property in abeyance. The Commissioner's books show the securities I hold. The deferred consist of

Third Mortgage,	\$263,000
Incomes,	276,000
Coupons,	93,335
Stock,	165,000
Total,	\$797,335

This amount receives no dividend from the proceeds of the sale of the road. Whatever it can be shown that these securities have actually cost me, with interest at six per cent, must be paid, in addition to the \$2,125,000 the road brought.

There are very considerable outlays to be made in repairs, which should not be delayed. If they intend to take the road, I can not lay out any more money upon it. Hence, I should have a definite answer—not such an article as appeared in your paper yesterday. I will hold the offer open until the regular annual meeting of the stockholders, which takes place next Thursday, the 22d instant. If not then accepted, it is finally closed. I shall then proceed to make

The orders and rulings of the court were severally excepted to by the party against which they were made.

EVIDENCE IN THE CASE.

MINUTES OF THE BOARD OF DIRECTORS.

The plaintiff and defendants offered in evidence various extracts from the *Minutes of the Board of Directors of the Covington and Lexington Railroad Company*, which are here condensed and extracted from, to such an extent as space permits. To make them the better understood, they are given in the order of their respective dates; and to avoid repetition, no mention is made as to which party offered the different parts of the minutes.

At a meeting of the Board of Directors, held in Covington (a), July 6th, 1854, at which were present M. M. BENTON, President, and Messrs. J. B. CASEY, F. G. GEDGE, J. T. LEVIS, A. ROBINS, and C. A. WITHERS, Directors, the following order was made directing the

ISSUING OF "INCOME BONDS."—*Whereas*, owing to the difficulties in negotiating the seven per cent thirty-year bonds of the company, arising from the stringency in the market and the high rates of interest now prevalent, it is believed by this Board to be good policy to issue bonds of a less denomination, maturing at an earlier period, and bearing a greater rate of interest. It is therefore ordered, that there be issued four hundred bonds of this company of the denomination of five hundred dollars, redeemable five years after date, bearing interest at the rate of ten per cent per annum, payable semi-annually, one-half at the Paris Branch of the Northern Bank of Kentucky, and the other half at the Covington Branch of the Farmers' Bank of Kentucky, with coupons attached. Ordered, that all the property, rights, credits, privileges, franchises, and income of this

the permanent repairs of the road. I hope that every stockholder will attend that meeting. Insinuations have been made, in the prints, since the sale of the road, signed "Stockholder," charging that the Directory connived at the sale. The Directory, through the papers, and by a circular addressed to every stockholder, demanded a committee of investigation. No one responded.

At the annual meeting next Thursday, full, thorough, and complete reports, in minute detail, will be placed before the stockholders, of the condition of the company up to the day of sale.

R. B. BOWLER.

(a) It is proper to say, that all the meetings of the Board were held in Covington, where the shops of the company were situate. At the time of the commencement of the foreclosure suit in Fayette County, at Lexington, the company had no property within the jurisdiction of the Fayette Circuit Court, except the graded part of the road within that county.

company be, and the same is hereby, irrevocably pledged to the payment of the interest and redemption of the principal of the said bonds.

At a meeting of the Board on the 6th of November, 1854, the same parties were present.

SECURITY FOR THE DIRECTORS' DEBT.—It was ordered that, *whereas*, M. M. Benton, John B. Casey, F. G. Gedge, S. J. Walker, Charles A. Withers, John T. Levis, and A. Robbins have become bound for large sums of money for the benefit of this company, as indorsers, drawers, and acceptors of bills of exchange, drafts, notes, bonds, and other evidences of debt, to several banks of Kentucky and elsewhere, and to sundry individuals and corporations, and to secure such liabilities to the Kentucky banks, have executed mortgages upon their individual estates to secure the same. Now, therefore, to secure and fully save harmless said parties, it is hereby ordered that a deed of mortgage be executed and delivered unto said Benton, Casey, Gedge, Walker, Withers, Levis, and Robbins upon all the estates, rights, credits, franchises, incomes, receipts, rents, profits, and property of said company of every kind and description, conditioned to fully secure and save harmless said parties from all damages, detriment, losses, expenses, charges, and money, sustained, endured, borne, or paid for or on account of this company, or growing out of or arising from said liabilities, and further conditioned that if the company make default or fail in any respect to indemnify and save harmless said parties on account of said liabilities, the said Benton, Casey, Withers, Walker, Gedge, Levis, and Robbins may take possession of said property, and use and employ the same to repay and reimburse them from all damages, losses, expenditures, charges, and payments, as then made or endured on said account, and to pay all expenses of running and using the road and property, and all improvements and repairs of the same, and keep and retain the same until said parties, and each of them, are fully reimbursed and released and satisfied for all payments, losses, damages, charges, and detriments endured and sustained aforesaid.

At the same meeting, attorneys were directed to be employed on behalf of the company, among whom was Hon. J. W. STEVENSON.

At a meeting of the Board, July 5, 1855, it was ordered, that the six hundred bonds [third mortgage] executed by this company, bearing date June 1st, 1855, payable to James Winslow, or order, thirty years after date, bearing seven per cent interest, payable semi-annually at the Bank of America in New York, and secured by mortgage on the road, be, and the same are hereby, transferred and delivered unto M. M. Benton, John T. Levis, and John B. Casey, in trust to be sold and disposed of to pay such debts of this company as they or A. Robbins, C. A. Withers, S. J. Walker, John Chownings, Thomas Garnett, are personally bound for, and for no other purpose, unless it becomes necessary to pay the ensuing September interest of this company.

At a meeting of the Board, held December 13, 1855, M. M. BENTON, President, C. A. WITHERS, J. T. LEVIS, J. CHOWNINGS, J. B. CASEY, T. GARNETT, A. ROBBINS, and E. OLDHAM, Directors, were present.

Messrs. Casey, Levis, and Benton, to whom had been transferred the six hundred third mortgage bonds of this company, of the denomination of one thousand dollars each, to pay off the debt of this company, for which individuals are liable, reported that they had sold the six hundred bonds unto J. W. Walker, at fifty cents to the dollar, and he to assume and pay that amount on the debts which are enumerated and scheduled, agreed upon and embraced in a contract with him, and that they had taken a mortgage on property to secure the payment thereof. Also hold a lien on the said bonds, to further secure the same. Also have taken S. J. Walker for further security, which sale and contract is hereby ratified and confirmed unanimously by this Board, and that the mortgage be recorded.

PARTIAL SUSPENSION OF THE COMPANY.—At a meeting of the Board, November 12, 1857, on motion of Mr. Oldham, the following resolution was unanimously adopted :

Resolved, That hereafter this company cease to pay the interest on the following bonds, namely :

Bonds of the city of Cincinnati, . . .	\$100,000	6 per cent,	\$6,000
Bonds of the city of Covington, . . .	200,000	" "	12,000
Bonds of the county of Pendleton, . . .	50,000	" "	3,000
Income Bonds,	373,000	10 per cent,	37,300
Income Bonds,	146,500	6 per cent,	8,790

Total, \$67,090

On the 14th December, 1857, a committee from the Pendleton County Court, called upon the Board, and remonstrated against the suspension on their bonds. A committee of the Board was appointed thereon; and the committee immediately reported, that it would be the duty of the company to resume the payment of interest on these bonds as soon as practicable; and that the suspension was made that by so doing the company would "ultimately have a basis for the security and payment, not only of interest, but of bonds and stocks." The resolution was adopted.

ANNUAL MEETING OF THE STOCKHOLDERS, 1857.—This meeting was held December 15th, and in general terms indorsed the action of the Board in their management of the road, and suspension of the payment of interest as stated. In the ANNUAL REPORT full explanations were given; and it was announced, in connection with other reduction of expenses, as a temporary matter, the better to enable the company to "resume payment of suspended claims at as early a day as possible." The earnings of the road were reported as rapidly increasing; and the prospects otherwise very promising. The leasing of the Maysville road from Paris to Lexington was announced; as also

the finishing of the Danville road thence to Nicholasville, thirteen miles, and the running of the company's cars over the same.

The stockholders then proceeded to elect directors for the ensuing year, which resulted in the election of the following gentlemen: John T. Levis, John B. Casey, B. W. Foley, and William H. Gedge, of Covington; R. B. Bowler, of Cincinnati; Augustus Robbins, of Pendleton County; Lucius Desha, of Harrison County; John Cunningham, of Bourbon County; and Edward Oldham, of Fayette County.

The new Board met for organization on the 16th. JOHN T. LEVIS was elected President, with a salary of \$2,000; C. A. WITHERS, Superintendent, with a like salary; and G. M. CLARK, Secretary and Ticket Agent, with a salary of \$1,500.

The President was made temporary Treasurer; and B. W. Foley, R. B. Bowler, and J. B. Casey appointed a committee to devise some suitable plan for the management of the finances of the company.

On motion of Mr. Bowler, a committee of two were appointed to confer with the third mortgage bondholders concerning the interest then lying over. Messrs. Bowler and Levis were appointed the committee.

January 13, 1858.—It was resolved, that considering the financial condition of the company, and the need for depot and other improvements necessary to carry on the operations of the road, "Colonel Bowler, John T. Levis, and John B. Casey were appointed a committee to endeavor to make arrangements with the holders of first and second mortgage bonds, whereby the interest would be postponed one year, at least."

The Executive Committee, "in consideration that R. B. Bowler shall satisfy and assure said committee that whatever sum or sums of money may be paid him, not exceeding \$11,000, shall be refunded by him on the 1st of March," were authorized to advance that amount to him.

A committee appointed to negotiate a loan of \$30,000 from the Northern Bank, reported, on the 11th of February, that \$20,300 could be obtained at ninety and one hundred and twenty days, on the names of J. T. Levis, R. B. Bowler, John B. Casey, A. Robbins, and B. W. Foley, which was agreed to.

February 11, 1858.—The committee on the management of the finances reported, and thenceforward a treasurer was dispensed with. All sums under \$100 were paid at the office of

the company, and the other funds deposited in the individual name of the President.

G. M. Clark was employed to make an estimate of the embankment necessary to make a fill at Townsend, and also of the probable cost of a viaduct across the valley.

April 8, 1858.—A communication from third mortgage bondholders was received, and a committee, of whom none should be holders of said bonds, was appointed to confer. The President, Mr. Foley, and Mr. Gedge, were appointed. The Executive Committee (consisting of Messrs. Levis, Foley, and Casey), and Mr. Bowler, "were appointed a committee to prepare statistics of the resources and necessary expenses of the company, for the purpose of exhibiting the same to the bondholders."

May 13, 1858.—Present, the President, and Messrs. Cunningham, Foley, W. H. Gedge, Bowler, Robbins, Desha, and Oldham.

The committee on conference with third mortgage bondholders reported, that they had had a conference with Messrs. Butler, Vallette, and other holders of such bonds, and recommended the adoption of this resolution; as "the proper disposition" of the subject:

"Resolved, That it is the opinion of this committee, that the coupons of the third mortgage bonds, due on the 1st day of December, 1857, be, and the same are hereby, ordered to be paid out of any funds belonging to the company, on or before the first of September next.

"J. T. LEVIS, B. W. FOLEY, W. H. GEDGE, Committee."

On motion, the report was recommitted to the committee, with instructions to inquire into the financial ability of the company to carry out the same, and report at the next meeting.

A depot at Paris was ordered to be constructed at a cost of \$5,000. Also, twenty freight-cars were ordered to be constructed or purchased in time for the Fall trade.

On motion of R. B. Bowler, a committee of three was appointed to see if a better place can not be had for a depot at Covington than the present; that the committee shall have full power to contract with the city council and individuals as to right of way and use of streets and avenues, if found necessary; to report the cost and expense of removal, and the ways and means to accomplish the same. Appointed on said committee, Messrs. Bowler, Casey, and Gedge.

The committee instructed to bring suit against the late

Treasurer, S. J. Walker, asked that the time be extended to the next meeting.

June 10, 1858.—A full meeting of the Board.

On motion of R. B. Bowler, the following report of the committee on conference with third mortgage bondholders was received and ordered to be spread upon the Minutes:

"The Committee of Conference, to whom was recommitted the report and resolution of same committee of May meeting of the Board, touching the payment of December interest on third mortgage bonds, etc., under instructions to inquire into and report on the financial ability of the road to pay the same, would report that, upon a thorough and careful investigation of the subject, they deem it wholly impracticable for the road to pay said interest, unless the indispensable repairs and improvements thereof should be totally neglected, and leave it with rolling-stock and machinery entirely inadequate for the carrying of passengers and the transportation of freight over said road. Your committee would, in justification of the above opinion, offer in connection with this report an abbreviated estimate of the necessary outlay and expenditure for the present fiscal year, ending November 1, 1858, to wit:

For depot purposes in Covington,	\$20,000
For depot purposes in Paris,	5,000
Payment of purchase of ground for engine slide,	7,400
Trestle-work, Townsend Valley,	15,000
Water-stations and wood-sheds,	5,000
Freight-cars,	18,888
Depot grounds in Covington,	2,000
Wolf, Scott, and Finch, locomotives,	10,200
Harkness, Moore & Co., "	1,900
Damage for right of way,	2,000
Amount unpaid on first and second mortgages of March, 1850,	2,800
Loan to pay interest on first and second mortgage bonds,	10,300
Five hundred tons railroad iron, at 60 dollars per ton,	30,000
Two hundred and fifty rolled, at 27 " "	6,750
Chairs, spikes, ties, etc.,	600
Extras above ordinary repairs,	4,000
	<hr/>
	\$145,600

"To this may properly be added the matured interest on income and the third mortgage bonds, as well as guaranteed interest on bonds issued to Lexington and Danville Railroad Company, and Pendleton County bonds, which matured before suspension in 1857—all of which is about \$18,000. In view of these facts, your committee have thought it advisable to give the above statement, and submit the same for such action as the Board may deem right and proper.

"Respectfully, JOHN T. LEVIS, B. W. FOLEY, WM. H. GEDGE, *Committee.*"

On motion of E. Oldham, the following resolution was unanimously adopted:

"*Resolved*, That in view of the foregoing report, exhibiting the wants of the road, in the way of repairs, etc., and in view of the financial inability to make the necessary and indispensable repairs, and furnish proper supplies, etc., as exhibited by the above report, and at the same time pay the interest due December, 1857, on the third mortgage bonds, it is therefore the opinion of the Board, that the company can not pay the interest, as recommended by the Committee of Conference, in its resolution of May 13, 1858."

Messrs. Levis, Robbins, and Foley were added to the Committee on Depot in Covington, with instructions to make some arrangements for loading coal, and for building depots in Covington and Lexington, and report at the next meeting.

The President, and Messrs. Desha, Robbins, and Cunningham were appointed a committee to examine Townsend-creek trestle-work, to test its condition, and report.

A communication from James Winslow, trustee, was referred to Foley, Bowler, and Levis, to consult counsel.

Further time was given the Walker suing committee.

June 19, 1858.—Upon a call of the President, the Board met at 10½ o'clock A. M. Present: John T. Levis, John B. Casey, W. H. Gedge, B. W. Foley, R. B. Bowler, and Augustus Robbins.

The President stated that the Board was called together to receive the report of the special committee appointed to report a plan of operations to the bondholders; whereupon the following report was read, and ordered to be printed, and otherwise advertised in such manner as the committee think advisable:

PROPOSITION TO BONDHOLDERS.

To the Mortgage Bondholders of the Covington and Lexington Railroad:

The present Board of Directors brought up the books during the past year, and obtained a correct balance-sheet. In November last their labors were completed. Their report, read at the meeting of the stockholders, on the 15th of December following (and since published), shows that:

The company owed to its officers, laborers, and bills payable given for supplies,	\$100,063 51
All the reliable resources they had to meet this demand with, were,	8,104 48
Showing a deficiency of	\$91,959 03
In less than thirty days they had interest maturing amounting to	31,000 00
	\$122,959 03
To meet this, nothing was available but the November earnings of the road,	20,685 00

Leaving an active debt (had the interest been paid), Dec. 1, 1857, of \$102,274 03

Under these circumstances, they had no alternative but to pass the December interest on the third mortgages and incomes, amounting to \$31,000, and to commence a rigid economy in the administration of the road. By borrowing \$20,000 on the individual credit of the directors, they were enabled to meet the interest, due March 1st, on the first and second mortgage bonds. This interest ought also to have been passed, and would have been, had there been time to get the facts before the holders.

One of the first acts of the new Board was to appoint a committee to present to the bondholders a report of the necessities of the road, and to ask their forbearance for a short period, to enable them to repair it, and also to finish it, WHICH HAD NEVER BEEN DONE. By the estimates which have been carefully made by this committee, there is required near \$800,000 to put it in complete condition,

and make it, as it deserves to be, a first-class road. The iron that was put on it has proved to be of a very inferior quality, and requires to be all re-rolled; moreover, a considerable quantity of new iron must be added.

There is scarcely a structure on it that can be called a depot-house; at Covington, its great terminating point, an old horse-stable is used for that purpose. The estimated loss and damage in five years, from the want of these conveniences, would pay for their erection. The bridges are decaying, and require prompt attention to save them from ruin; there are no wood-sheds; additional water-stations are absolutely required; its floating debt harasses and embarrasses it; it is imperfectly stocked; and to enable it to do its business, it requires additional passenger-cars, a large number of freight-cars, and four more locomotive engines.

Now, how are the means to accomplish all this to be obtained? The road can not borrow the money, it has no securities to give. The directors, in the aggregate, with no large pecuniary interest in it, but feeling its great value and importance to the country, have so liberally advanced their individual means and credit, they can not be expected to go any further.

There is nothing now left but to appeal to you; and in doing so, the Board propose to put you to **LITTLE OR NO INCONVENIENCE**, for all that is asked is to loan a few coupons to be funded. The net earning of the road will not only pay you the semi-annual interest, put it in the finest condition, stock it well as it should be, but will also provide a sinking fund sufficient to liquidate the funded coupons at maturity.

This is demonstrable as follows:

\$260,000 first mortgage bonds mature March 1st, 1862. There are but eight coupons left, amounting to		\$72,800
100,000 firsts, due March 1, 1867, } From these cut ten coupons,		398,000
1,000,000 seconds, due " " 1883, }		
498,000 thirds, due June 1, 1885. This issue calls for \$600,000, but \$100,000 may be considered to be under the control of the Company. From these cut eleven coupons,		191,700
		<u>\$662,530</u>
Less interest, averaged to September 1st, 1858,		111,380
		<u>\$551,150</u>

This amount to be funded in the bonds of the company, payable as follows: First mortgage in four years, second mortgage in five years, and third in five and a half years, to bear interest at seven per cent per annum; and as the coupons cut off are secured by a mortgage on the road, they can either be attached and go with the bond, or be put into the hands of the trustees, as the holders may prefer.

The first semi-annual interest on these deferred bonds will be due March 1st, 1859, amounting to \$19,200.25, and for the year, \$38,580.50.

Which for five years would be	\$192,900
The estimated outlay to complete the road, is	800,000
	<u>\$992,900</u>

Say that the road nets \$250,000 per year, which is a low estimate; this will give for the five years, 1,250,000

And leave for the Sinking Fund,	\$257,100
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Which, if judiciously managed, with the increased earnings over and above the estimates, will absorb the funded coupon debt.

After the 1st of March, 1864, the annual interest on the entire mortgage debt, will be	\$132,660
Say at that time the road will be earning	300,000

There will be left per year, toward canceling debts not secured, and dividends on the stock,	\$167,340
--	-----------

Believing that it is to the interest of the bondholders to carry out the suggestions of this report, and that the repair and equipment of the road should immediately be commenced, the Board will proceed to do so, presuming that you will ratify this report.

J. T. LEVIS, *President.*

[The following P. S. is not in the book of minutes, but is referred to in Mr. Lewis's deposition, and explains itself.]

P. S.—Since the above report was placed before the public through the press, the only objection we have heard made to it is, that the third mortgage bonds do not bear their proportion—that is, the difference in the scale of coupons cut off is too small.

It was not contemplated to make any scale, and as all received their interest on the deferred, all should share alike. The difference made in the quantity of each security was unavoidable, owing to the fact of the first mortgages having but eight coupons on them, and the third having one coupon lying over. The Board endeavored to do justice to all, and show partiality to none; but if any are dissatisfied, and it is possible to get the bondholders together, and they can arrange it better, we shall be pleased. In the mean time the Board feel it to be their duty to put the road in order as fast as their receipts will admit—and they are using their means for this purpose, thereby making your security the more solid.

Whereas, this Board has, by the adoption of the foregoing report, manifested its determination to use the proceeds or earnings of the road for the indispensable repairs and equipments thereof, and that for some time the regular interest of the mortgage bonds will have to be funded, it is therefore the opinion of this Board that upon strict principles of justice and equity the interest falling due on the third mortgage bonds in December, 1857, ought and should be paid before the carrying out of the above object. Whereupon, on motion of Mr. Gedge, the following resolutions were adopted:

Resolved, That so much of the resolution passed at the regular meeting of this Board in the present month, as declares the company unable to pay the December interest on third mortgage bonds, be and the same is hereby rescinded.

Resolved, further, That the interest on the third mortgage bonds falling due December 1, 1857, and previous thereto, be paid out of any money belonging to the company on or before the 1st of September next.

July 8, 1858.—All directors present, except Messrs. Cunningham and Robbins.

The Committee on Townsend Trestle reported that they had visited the trestle with Mr. Clarke, bridge-master:

"One of the committee, in company with Mr. C., walked over the bridge and trestle, and examined closely the track, timbers, and cross-beams, which they found in very good condition, except some few timbers, which seems to have had some sap-wood left, which was decayed, but not so as to weaken the structure. . . . The timbers generally were found in good condition. Some of the tim-

bers have been strained by not being kept properly adjusted. Extra supports have been placed between each post of the trestle, to strengthen the bearing beams. The bridge portion of the structure appears to be in very good condition. Two freight-trains passed over the work whilst a part of your committee were under the same, and no sway or tremor could be observed. Your committee believe that the structure is entirely safe, and can be kept so for some time to come, but would recommend that as it will take a long time to rebuild or remodel the trestle, that some immediate action be taken thereon, and such steps taken as will insure a safe and permanent bridge across the valley.

"JOHN T. LEVIS, *Chairman Committee.*"

It was ordered that advertisement for proposals for the erection of stone piers across the valley, should be made.

The committee to whom was referred the communication of James Winslow, reported that they had consulted counsel, and were advised "that as the notice was from three bondholders, as for a special purpose, and that purpose having been arranged, and no suit brought by them, the notice is not of a binding character."

Longer time was asked for and granted to the Walker suit committee.

August 12, 1858.—The Townsend Trestle and the Walker suit were again before the Board, but no final action was had.

The President, and Messrs. Casey, Foley, Gedge, and Bowler were appointed a committee to confer with the bondholders of the road, "and to adopt such measures, and close such negotiations touching the same, as in their judgment may redound to the future advantage and success of the road."

September 9, 1858.—The Walker suit and the Townsend Trestle were again under consideration, and postponed.

The President and Mr. Bowler were appointed a committee "fully authorized to employ a competent engineer, and place him immediately on the road for the purpose of ascertaining and defining the cost of such necessary repairs and improvements as may be adequate to the wants of the Covington and Lexington Railroad, and for the purpose of giving satisfactory information to all parties interested."

[NOTE.—See Report and Estimate of WILLIAM H. CLEMENT, attached to his deposition hereinafter.]

Mr. Foley moved that the coupons on the Covington guaranteed bonds be paid. On motion of Mr. Bowler, the motion was laid on the table.

October 15, 1858.—On motion of Mr. Desha, the interest on the first mortgage bonds, falling due September 1, 1858, were ordered to be paid.

[INTEREST ON SECOND MORTGAGE BONDS.—On the 1st of November, 1858, the second mortgage bondholders held a meeting at the Burnet House, in Cincinnati, and sent the following proposition to the Board. It is inserted here, from an Exhibit to the deposition of Henry Hanna, to make more intelligible the action of the directors in reply thereto:]

At a meeting of the committee of the second mortgage bond-owners of the Covington and Lexington Railroad, held on Monday, November 1, 1858, the following proposition was submitted and unanimously adopted:

"The Cincinnati Committee appointed by holders of second mortgage bonds of the Covington and Lexington Railroad Company, have fully discussed and considered the whole subject committed to them; and having had before them exhibits of the business and liabilities of the company, and also a proposition from them, for an arrangement of time upon a portion of the second mortgage coupons, have come to the following conclusions:

"1. That the receipts from the earnings of the road are sufficient to enable the Board of Directors to pay, promptly and continuously, the interest upon the first and second mortgage bonds, and make such repairs upon the road and increase of rolling stock as the business of the road may demand; and that the committee, therefore, feel themselves compelled to decline the proposition of the railroad company.

"2. That inasmuch as the sixty days allowed by law to the company, in which to provide for the interest upon the second mortgage bonds, have expired without any provision having been made for the payment of said interest (owing probably to the fact that negotiations were pending between the railroad company and the committee), that no advantage will be taken of the delay, provided the interest due the 1st of September last, shall be provided for by the railroad company, by the 1st of January next, with the interest thereon.

"3. That the railroad company shall notify the committee of their acceptance or rejection of this arrangement, within fifteen days from this date."

REPLY OF THE DIRECTORS.—November 11, 1858.—A full meeting of the Board. The President presented the action of the second mortgage bondholders, accompanied with a request that the Board would take some action thereon. A preamble and resolutions were adopted. The substance of the preamble is embraced in the resolutions, which are as follows:

"Resolved, 1. That the statements contained in the first conclusion of said meeting, touching our ability to pay promptly the interest on the first and second mortgage bonds, and make such repairs, and furnish rolling stock, etc., from the earnings of the road, at this time are not true.

"Resolved, 2. That the directors have been somewhat disappointed in the action of said committee; and find that they, perchance, like those they represent, have not been actuated with that spirit of liberality which would cause them, for a short time, to lose sight of the stringent enforcement of their dues.

“Resolved, 3. That the President of this Board be, and he is hereby, authorized and directed to inform the committee of second mortgage bondholders of the Covington and Lexington Railroad, that this company can not comply with the requirements contained in their proceedings of November 1, 1858, in consequence of the absolute want of funds to do so; but at the same time, to give assurances that we have every encouragement to believe that, during the year 1859, the company will be enabled to pay fully the coupons on the first and second mortgage bonds, matured and maturing, up to that time, and regularly to continue to do the same at all times thereafter.

“Resolved, 4. That whatever amount of funds this company may have on hand the 1st of January, 1859, after paying the current expenses, shall be promptly applied to the payment of coupons past due on the second mortgage bonds; and that the company will continue to apply the earnings of the road, as fast as the same can be made available, until the entire interest on said bonds shall have been paid.”

At the following meeting of the Board, December 9, 1858, Mr. Bowler being present, it was “ordered that the report of the committee of bondholders, and the reply thereto by this company, be published in pamphlet form for distribution;” and he was added to the Executive Committee, “for the purpose of publishing the above report and reply.” At an adjourned meeting, on the 14th of December, the committee reported that the proposition and reply could not be printed in time for the stockholders’ meeting; and thereupon the printing was dispensed with at that time.

On the 11th of November, at the meeting of the Board, the President, and Messrs. Gedge, Bowler, and Robbins were appointed a committee “to settle the matter of monthly balances to be allowed S. J. Walker, while Treasurer of the company, for which no interest is to be charged him.” At the meeting on the 14th of December this was reported as having been done.

ANNUAL MEETING OF THE STOCKHOLDERS, 1858.—*December 15th.*—The President and other officers presented their annual reports, which “were adopted and ordered to be printed.”

On motion of Mr. BENTON, a committee, consisting of himself, Judge Kinkead, Judge Carr, Caleb Walton, and Judge Samuels, were appointed “to inquire into and report (after conference with the creditors) the best course, in their opinion, for this company to pursue in reference to its affairs.” And the holders of the several classes of bonds were requested to appoint committees to confer with this committee of the stockholders.

Counsel differing as to the terms of the President's Annual Report, and, indeed, its meaning having been attempted to be sworn to by one witness, it is given in full. It will be seen that no reference is made to the foreclosure suit in behalf of the second mortgage bondholders, in which service was made on the President on the 1st of December preceding:

PRESIDENT'S REPORT.

OFFICE OF COVINGTON AND LEXINGTON R. R., COVINGTON, Nov. 1, 1858.

To the Stockholders of the First Division of the Kentucky Central Railroad:

GENTLEMEN,—In conformity with the charter of your company, it becomes my duty to lay before you a history of the actions of your directors, and an exhibit of the condition and operations of the road for the fiscal year just closed.

As reported to you by supplementary statement, at your last annual meeting, some radical change of policy was found to be imperative; and, for the causes then given, your managers stopped payment of interest on certain classes of claims from and after November 12, 1857, paying on said claims only the interest due prior to that date, so as to make no distinction between parties holding the same class of obligations.

There has been no interest or coupons paid on any of the claims so suspended, which became due after the date of the order above mentioned, and no definite plan has been adopted for adjusting said indebtedness, from the fact that it was deemed advisable to first make some amicable arrangement with the holders of the mortgage bonds, negotiations for which purpose have been pending for some time—so far without success.

To enable your directors to secure the property of the road, and put it in a condition that it can be more profitably and safely worked, it was absolutely necessary, and deemed advisable, to at once expend a considerable portion of the earnings in building cars, extending side-tracks, ballasting, and removing defective cross-ties and rails from the main track, thereby making it more permanent, and preventing rapid decay.

The depot at Paris was built to keep from transacting the heavy business of that station out of doors. The amount due officers and laborers, which has been held back to enable the company to pay the coupons that were paid, was to be provided for, and has been partially paid.

And there were other claims against the property of the company, which, if not paid, would have subjected the company to serious loss and inconvenience; which claims have been partly paid and arranged.

In making these expenditures, and others of a similar nature, in addition to the regular operating expenses, your directors were left without the means to pay the interest on the third mortgage bonds, falling due on the 1st of June last, and that on the second mortgage, due the 1st of September last; also, coupons due at the same time on the bonds of the company, guaranteed by the city of Covington.

They therefore stopped payment of all coupons on said bonds except those due previous to the above dates, hoping to arrange with the holders for a further expenditure in building depots, permanent bridges, etc., improvements absolutely essential, and which would add greatly to the value of all the securities of the company, as well as increase the net earnings of the road.

Your managers deplore the necessity of asking creditors for assistance, but they feel conscious of the rectitude of their policy, and that they ask nothing that will not be beneficial to all the interests involved.

The business over your road for the past twelve months has been more equally distributed through the entire year, having had no excessively large receipts, or very small ones, in any one month, enabling the traffic to be conducted with more safety and satisfaction with the inadequate accommodations possessed.

The earnings have been somewhat less than anticipated, owing to the falling off in passenger-travel, which, no doubt, may be attributed, in part, to the financial panic of last Fall, from which the public have not yet entirely recovered. Nearly all of the roads in this country, and especially those in the West, show conclusively, by their receipts in this department, that there has been some general cause to keep the people from traveling.

Notwithstanding the decrease in this particular, the gross earnings exhibit a gradual increase, although the work has been done with a short supply of rolling stock, and without, comparatively, any depot accommodations, proving satisfactorily the growing importance of your work to the country through which it passes, and that the local business, being steadily built up, will, in a few years, be sufficient to sustain your company, if it can be relieved of its present embarrassments, which have, from its commencement, hung over its management like an incubus.

It requires no elaborate theorizing to demonstrate the first and continued cause of all the financial difficulties of this company, as it is well known that the road was commenced and prosecuted to its present condition during a period of time when there was one of the greatest financial panics with which the country was ever visited.

It was want of capital at the beginning of the enterprise, and this has continued to the present time. To relieve your road of its present difficulties is no small undertaking; but your directors used, and have continued to use, their most urgent and honest efforts to attain that end, hoping, if met with a spirit of liberality by all parties concerned, to eventually succeed.

Your track (excepting bridges) is now in a better condition than it ever has been, and, with the addition of sufficient rolling stock, good depot accommodations, water-stations, and permanent bridges, would be a first-class road, as from its central location and importance it should be.

For a detailed statement of the operations of the road, I refer you to the Superintendent's report, and for financial condition thereof to the tabular exhibits accompanying the Secretary's communication; all of which I respectfully submit for your consideration.

JOHN T. LEVIS, *President.*

The earnings were \$458,820.99; the current expenses, \$239,262.22; and the net earnings, \$198,316.80. The Superintendent, in his report, says that among the expenditures were large amounts on improving the track, "two trains having been employed, during the Summer and Fall, in clearing out the ditches, hauling stone for ballast, and improving the road-bed generally." He stated the road was then in better condition than it ever had been.

On proceeding to the election of directors, it was found that John T. Levis had received 5,203 votes; John B. Casey, 4,496; B. W. Foley, 4,221; W. H. Gedge, 4,731; R. B. Bowler, 3,339; A. Robbins, 4,175; Lucius Desha, 4,175; John Cunningham, 5,213; and Edward Oldham, 4,284; and they were declared elected directors.

The same officers, with the same salaries, were re-elected.

The committee on settlement with S. J. Walker was continued; and on the 17th of December they reported a settlement, and the same was adopted. Two thousand dollars was ordered to be paid him, in full of his salary as Treasurer for the year 1857.

December 27, 1858.—A communication was received from the committee of stockholders appointed under Mr. Benton's resolution, in regard to the affairs of the company, and asking the concurrence of the Board in their proposed action. This was promised, and the following resolution (embracing the substance of the action of the Board) adopted:

"Resolved, That we will, as directors, cheerfully conform to any act of the committee appointed by the stockholders, at their recent annual meeting, so soon as their action shall be reported to and approved by the said stockholders, conditioned that all shall be done in compliance with the charter, and on such arrangements as can be accomplished and carried out by the Board."

February 10, 1859.—The Board having been asked to pay a judgment for \$15,000 recovered by the Lexington and Danville Railroad Company, it was answered that the payment "would be inviting suits, and giving precedence to claims of a minor and more inferior character over those that have already precedence by superior and prior lien;" and payment was therefore, at that time, declined.

March 10, 1859.—"Messrs. Gedge, Bowler, and Foley were appointed a committee to investigate the subject of damages between this company and the original Western Baptist Institute; and also to ascertain on what terms an additional amount of ground can be purchased from said Institute, for additional room."

March 11, 1859.—At a called meeting of the Board, a proposition from H. VALLETTE, Esq., to lease the road for a term of years, was presented and discussed. The same was declined on

the ground that the Board had no power to part with the possession or control of the road.

April 14, 1859.—The resignation of Lucius Desha, dated March 18th, as a director of the company, was received and spread on the minutes.

The committee on purchasing land from Walker reported progress; and another committee; consisting of Messrs. Levis, Bowler, Foley, Robbins, Gedge, and Casey, were appointed on the Townsend Valley improvement.

April 28, 1859.—A called meeting was held to hear the report of the committee on purchasing land from Walker, which was in favor thereof, and the same ordered to be done for the sum of \$27,000 cash.

On motion of Mr. Bowler, it was recited that S. J. Walker had settled his account as Treasurer; and thereupon his securities were released, the settlement confirmed, and the Secretary directed to close his account on the books of the company.

June 9, 1859.—Committee on Townsend Valley improvement reported that they were negotiating a purchase of land as a "burrowing pit;" and a committee was appointed to consider the subject of building a protection-wall for Mr. Carneal.

July 14, 1859.—The committee appointed to settle with S. J. Walker, was given full power to settle his "*bond account*," with power to "pay off and satisfy whatever amount may be due said Walker."

PAYING THE DIRECTORS' DEBT.—*August 9, 1859.*—At a called meeting, held this day, there was present John T. Levis, B. W. Foley, W. H. Gedge, R. B. Bowler, and A. Robbins. Whereupon the following resolution was unanimously passed:

"Whereas, some of the former, and a portion of the present directors of the Covington and Lexington Railroad Company, became largely bound and liable for the benefit of said road, by certain notes, bills, bonds, and other obligations in writing, which said liabilities, or a portion thereof, are still existing, and are at this time urgently pressing upon said parties for payment—said parties being M. M. Benton, John B. Casey, John T. Levis, Augustus Robbins, C. A. Withers, and S. J. Walker; and whereas, we deem it our duty while we have it in our power as directors, to remove, as far as practicable, said liabilities; therefore,

"Resolved, That the President be, and he is hereby, authorized and directed to apply such funds of the company as may now be under the control of this Board, and such as may hereafter be derived from United States mail service, also the claim of Rogers & Sherlock, and apply the same to the payment of said liabilities,

so far as said funds may go toward the payment of said obligations, in such manner as in the judgment of said President may best redound to the interest of said road, as well as the full settlement of the aforesaid claims."

As connected with this subject, and for the better understanding of the matter, it is here stated that at the following meeting of the Board, *September 8th*, the committee appointed to settle Walker's "bond account," Messrs. Levis, Bowler, and Gedge reported that they had allowed the said Samuel J. Walker various sums of money as charges against the company, in all amounting to \$26,556.03, and which "was fully agreed to by the Board."

As also connected therewith, this account, as copied from the books of the company by E. B. CLARK, and appended to his deposition, is here given:

LEVIS, BENTON, AND CASEY, TRUSTEES,		Dr.
1859. June 16—J. W. Walker,	.	\$3,399 92
" 30—R. A. Jones, P. M.,	.	7,500 00
" 30— " " "	.	5,970 00
July 31— " " "	.	9,950 00
" 31— " " "	.	4,965 00
" 31— " " "	.	5,966 00
Aug. 13— " " "	.	24,286 97
" 31—U. S. Mail,	.	4,317 85
Sept. 30—R. A. Jones, P. M.,	.	6,700 62
		<hr/>
		\$73,056 86
CONTRA,		Cr.
1859. Order of S. J. Walker, for Levis, Benton, and Casey,		
Trustees, to pay amount allowed by committee to settle		
said Walker's bonded account,	.	\$26,556 03
Profit and Loss,	.	46,500 33
		<hr/>
		\$73,056 86

It was shown that at the times named, R. A. Jones was the paymaster of the company.

July 28, 1859.—Board organized as a called meeting. Present: John T. Levis, John B. Casey, B. W. Foley, Wm. H. Gedge, R. B. Bowler, and Augustus Robbins.

The object of the call was stated by the President. He had received a communication from W. W. Trimble, Esq., of Cynthiana, asking the appointment of a director for the county of Harrison, to supply the vacancy occasioned by the resignation of Gen. Desha in the Board.

On motion, *Resolved*, That there is no urgent, indispensable necessity for the election of a director for Harrison county, before the next regular meeting of the Board; therefore the matter is postponed to that time.

November 10, 1859.—Board present, except Mr. Robbins.
"The President communicated to the Board the sale and con-

firmation of the sale of the road to R. B. Bowler,—which was ordered to be filed. On motion of W. H. Gedge, ordered that the regular annual report be made, and that the stockholders be, as heretofore, called together."

ANNUAL MEETING OF THE STOCKHOLDERS, 1859.—*December 22.*—No formal report was printed; but the following is the *Cincinnati Enquirer's* report (with a few abbreviations of immaterial matters), as offered in evidence by the defendants, and made an Exhibit to George M. Clark's deposition. It contains parts of the annual reports of the officers; namely, the President, Secretary, and Superintendent.

The annual meeting of the stockholders of the Covington and Lexington Railroad Company was held at the office in Covington, yesterday, at 11 o'clock, and continued throughout nearly the entire day. The meeting was called to order by Mr. Levis, the President, when Judge Samuel, of Paris, was appointed Chairman, and George M. Clark acted as Secretary. The first business in order was the reading of the report of the officers, an abstract of which we give below:

REPORT OF JOHN T. LEVIS, PRESIDENT OF THE ROAD.—Mr. Levis submitted his report to the stockholders, from which we make such extracts as will interest the public. After stating the fact that the stockholders had been informed at the last annual meeting of the difficulties then existing respecting the road, the President says that a committee of the stockholders was appointed to negotiate with the creditors of the company, and to report, in their opinion, the best course for the company to pursue. That committee consisted of Judge Carr, of Lexington, Judge Samuels, of Paris, C. Walton, Esq., of Cynthiana, and M. M. Benton, Esq., and Judge Kinkadee, of Covington. The committee met a committee of the creditors shortly after their appointment, but were unable to effect any beneficial arrangement, and, consequently, dispersed without calling the stockholders together to hear the report.

The President then rehearses the proceedings in the Fayette Circuit Court up to the sale of the road (with which those interested are already familiar) to Mr. R. B. Bowler, for the sum of \$2,125,000.

The funds accruing, less expenses, after the decree, until the day of sale, amounting to \$22,973.54, were paid to the Commissioner, and the amount accrued from the day of sale to the confirmation was paid to the purchaser, and the road and its appurtenances delivered over to him, and are now in his possession.

The report gives the following figures: Total indebtedness of the company, \$3,267,532.64; amount of the sale of the road, \$2,125,000; liability against the company, \$1,142,532.64. The means for the payment of the liabilities are thus enumerated by Mr. Levis: Income bonds, amount due from sundry stock subscriptions, and bills receivable, \$198,422.87, leaving unprovided for \$944,109.77.

Of the bills payable and stock subscriptions, a large proportion are worthless, and they have been taken into the custody of the Kenton County Court, under attachment by sundry creditors, and a receiver appointed by the court for their collection. Of this large sum (\$944,109.77), *nearly* the whole amount is

now due; and the balance falls due February 1, 1860, the time the last issue of the income bonds mature.

In concluding his report, the President remarks:

"Your directors were aware at your last annual meeting, and advised you, unless some combined and vigorous action was taken on your part, they could not keep control of the road. It has now passed into the possession of the purchaser, who has advertised that he would return it to your possession by your reimbursing him for his outlay, and relieving him from his bonds, which offer, by his card, closes this day, unless accepted by you. You now have the whole case before you for your deliberate action.

JOHN T. LEVIS, *President.*"

REPORT OF THE SECRETARY.—George M. Clark, Secretary of the Company, gave a detailed exhibit, accompanied by tabular statements, of the assets and liabilities of the company, the earnings, etc., ending the 5th of October, 1859, from which we make the following abstract:

[The Assets of the road were aggregated at \$4,375,993.28, and the Liabilities at \$4,376,993.29. Net earnings for 11 months 5 days, \$227,734.77.]

Earnings of the Road for eleven months and five days, ending October 5, 1858.—The following tabular statement exhibits the earnings of the road for eleven months and five days, ending October 5th, when the sale to Mr. Bowler was confirmed, with a statement of the earnings for the same time during the previous year:

	1857.	1858.	M'thly increase.	M'thly decrease.
November, . . .	\$43,966 59	\$46,778 19	\$2,811 60	
December, . . .	46,493 90	35,908 24		\$10,585 66
	1858.	1859.		
January, . . .	26,198 12	35,978 29	9,780 17	
February, . . .	23,512 60	30,688 23	7,170 63	
March, . . .	30,912 08	38,326 48	7,414 40	
April, . . .	32,265 90	37,638 06	5,392 16	
May, . . .	37,893 19	42,566 02	4,672 83	
June, . . .	34,174 83	37,553 10	3,378 27	
July, . . .	30,819 76	43,650 24	12,830 48	
August, . . .	41,934 09	48,010 37	6,076 28	
September, . . .	48,165 12	52,795 46	4,630 34	
October, five days,	7,148 56	8,933 31	1,784 75	
	\$403,484 74	\$458,820 99	\$65,921 91	\$10,585 66
		403,484 74	10,585 66	
		\$55,336 25	\$55,336 25	

[This table—Exhibit D to the Secretary's Report—was not published in any of the newspapers at the time, most probably because not furnished to the reporters. It was verified by the Secretary, Mr. Clark, and is too important to omit:]

RECEIPTS.

From car and house rent,	\$394 51
From discount on bills paid and materials sold,	1,214 44
From subscription to capital stock,	192 88
From United States mail service,	6,648 13
From Adams Express Company,	8,619 15
From passage,	155,122 27
From freight,	287,493 54
Balance on hand, November 1, 1858,	6,176 88
	<u>\$465,861 40</u>

DISBURSEMENTS.

For current running expenses, including balance due Nov. 1, 1858,	\$253,844 84
For coupon interest,	31,955 00
Bills payable,	40,417 70
For real estate, right of way, and construction,	31,475 49
For old bank debts of the company,	71,328 33
For amount paid S. J. Walker on final settlement,	13,557 50
For amount paid W. A. Dudley, Commissioner, per order of court,	22,973 54
Balance on hand, October 5, 1859,	309 00

\$465,861 40

REPORT OF THE SUPERINTENDENT.—The report of Colonel C. A. Withers, the Superintendent of the road, was not submitted to the meeting, but we were permitted to make the following abstract: [The entire report, with the exception of some statistics (in substance already shown), is here given. Of it, the Road-master, Ralph N. Reynolds, said: "I acquiesce in every word of the report—that it is so."]

COVINGTON, *October, 1859.*

JOHN T. LEVIS, Esq., PRESIDENT: SIR,—This road having been sold under a decree of the Lexington Circuit Court, on the 5th day of October, 1859, it devolves upon me to give you a statement of the operations of the department under my supervision, for eleven months and five days, up to the 5th of October, 1859. I therefore respectfully submit the following report:

The operating expenses upon the earnings, including the rent of other roads, amounts to fifty and three-tenths per cent; not including rents of other roads, forty-two and two-tenths per cent. The cost of repairs to locomotives, including oil, tallow, waste, etc., is six and four-tenths cents per mile run. Our passenger and freight business has been done with great regularity, and, I believe, to the satisfaction of the patrons of the road. It gives me much pleasure again to say, that no passenger has ever been seriously injured on this road.

Road.—The road is now in good condition, having been much improved by the large amount of ballasting distributed on the line during the year, in cleaning out the ditches, and keeping up, as far as practicable, a thorough drainage, and removing land-slides, and raising embankments with the earth removed. Owing to the peculiar nature of the soil through which the road passes, and the very large number of cuts and fills, a heavy expenditure will be required for years to come, in the way of ditching-trains, to keep up a thorough drainage, and removing land-slides. During the year there has been 8,082 days' labor in cleaning out ditches, 5,465 days' in ballasting track, and 4,002 days' in removing land-slides. Ten thousand new ties have been put in during the year, and twenty thousand more will be required the ensuing year, to keep up the track. The iron from Paris to Falmouth is in good condition, with the exception of a portion of the road. Below Falmouth it is in bad order, and requires renewal. Two hundred tons of new iron, with the old iron that has been taken up, which should be re-rolled, will be required to supply the place of the defective iron.

Cars.—The company own:

10 Passenger-cars.	4 Baggage-cars.
150 Box Freight-cars.	55 Platform-cars.
8 High Rack-cars,	20 Hand-cars.
16 Dump-cars.	2 Rubble-cars.

Our passenger and baggage cars have been in use for a long time; and having no sheds to protect them from the weather, they have suffered greatly

from decay of timber and other materials. During the year four passenger-cars have, with the exception of tops and floors, been entirely rebuilt, repainted, etc., at a cost of one thousand to twelve hundred dollars each. Ten new platform cars have been built at your shops during the year; five of them have replaced a like number worn out and broken up, leaving a net increase of five cars over last year.

Engines.—The Company own six heavy freight-engines, seven light freight and passenger engines, and one switching-engine; in all, fourteen, all of which are in running order. Miles run during the year, 268,984; increase over last year, 10,355 miles.

Bridges.—The bridges, with a few exceptions, have been in use six or seven years, all that time exposed to the weather, none of them having been covered, except the one recently built at Bowman Creek. A number of the bridges require immediate attention. I would recommend the rebuilding, the coming year, of all the bridges on the road, except the Falmouth bridge, one above Cynthiana, one at Paris, and the Bowman Creek bridge.

I must again, respectfully, call your attention to the great importance of commencing at once the filling of Townsend Valley, as the present structure will not be safe to run over much longer.

Construction.—The extraordinary expenses of the year have been, eight hundred feet of side-track put down at Lexington, and new cattle-pens; at Cynthiana, one thousand feet of side-track, and new water-house, and engine for pumping water; enlarging water-station at Falmouth, and additional tank; six hundred feet side-track at Catawba; one thousand feet of side-track at Covington; and platform for loading coal.

For further statements in relation to the working of the road, I would respectfully refer you to the tabular statements accompanying this report. All of which is respectfully submitted.

C. A. WITHERS, *Superintendent.*

After the reading of the reports of the officers, the meeting adjourned until 2 o'clock in the afternoon. Previous to the reassembling, the leading stockholders held a meeting, and agreed upon a ticket to be submitted, which included but two of the old directory, Mr. John B. Casey, of Covington, and Mr. Edward Oldham, of Fayette. These were subsequently stricken out, and an entire new Board elected.

Some gentlemen suggested that, as this was an "anti-Bowler meeting," it would be proper for any gentleman named in the list, who belonged to the other side, to state his position. [Mr. Oldham asked to be, and was, excused from serving as a director.]

Afternoon Session.—At the opening of the meeting in the afternoon, M. M. Benton, Esq., of Covington, moved that the report of the officers be received and approved, but subsequently modified his motion so as to receive it only.

Mr. Zinn, of Cincinnati, said it was hard to ask men to approve a report, who claimed that their property had been sold and sacrificed. He was willing that a vote of thanks to the officers should be passed, but did not like to vote to approve the report.

Mr. Benton had no desire to commit the stockholders to the policy of the Board, but only wished an indorsement of the facts presented.

Mr. Eggleston, President of the Cincinnati Council, who had been authorized to vote upon the stock held by the city, said it was asking too much to require

Cincinnati to approve of the acts of the Board of Directors. He could not consent, as the representative of the city, to thank the officers for selling out their all in the road. It was more than he could swallow. The directors may have done just right—he could not say, upon the limited information he possessed, that they had not—but the results were bad, very bad.

Dr. Stevenson moved to refer the reports to a committee, to report to an adjourned meeting on the 24th of January.

Mr. Benton denied, in sharp, earnest language, that Cincinnati was a stockholder in the road, and objected to Mr. Eggleston's speaking at a meeting of stockholders. The city was simply a creditor, and held \$200,000 of stock as collateral security only. . . . The report was simply a statement of facts, and, if the stockholders refused to indorse them as correct, then they impeach the integrity of the officers. Let him who dare, attempt to impeach a single act in the administration of the directory, from the commencement, and an issue would be raised quicker than the doubter supposed.

Judge Moor, of Covington, advocated the reference. It was impolitic to hurry a vote. He was anxious to save the feelings of the directory. One strong reason why the reports should not be received by the Board was the fact that the case was still pending in the Court of Appeals. If he had lost his money, he still had the right to vote not to receive the report.

Colonel John W. Finnell, of Covington, eloquently defended the integrity of the Board of Directors. They had his entire sympathies. He knew that some of them had been completely borne down in their efforts in behalf of the road, and it was no more than a simple act of justice that the facts which they presented should be received as true. . . . He was willing to take the report as the man in the Frankfort Penitentiary took the Gospel of Paul. He had n't read it, and did n't exactly understand it, but he had heard that Paul was a remarkably clever fellow.

Mr. W. Moor followed, and disclaimed any intention to impute any dishonesty to the directory; but he believed the errors they might have committed were those of the head, and not of the heart. They were strangers to the business, and it was not remarkable that they should have made some mistakes. He believed that, when the Board found themselves personally involved for the road, that they had forced the securities into the market at ruinous rates, for the purpose of reimbursing themselves. The stockholders were unwilling to have all their property sacrificed to pay the face of securities that were put into the hands of sharpers at ruinous rates. He was informed that not a single director had paid a dollar of his private means for the benefit of the road.

Mr. Eggleston attempted to speak on behalf of Cincinnati, but was objected to on the ground as previously stated. He was finally permitted to proceed, out of courtesy. . . . Mr. E. proceeded to say, that every argument used here satisfied him, more and more, that there was something rotten. In the face of increased receipts, and a prosperous business, the road has been sold out. . . .

General Desha followed in an explanation of the vote he should give on the motion to refer. In voting in the affirmative, he did not intend to cast any imputation upon the integrity of the Board. While a member of the directory, they had been his associates, and he had no disposition to impeach their integrity.

The motion to refer the reports to a committee, to report at an adjourned meeting on the 24th of January, was then carried by a very decided majority. The Chairman appointed the following gentlemen as such committee: Peter Zinn,

of Cincinnati; Dr. Stevenson, of Covington; General L. Desha, of Harrison; Wm. C. Lyle, of Bourbon; Richard Stowers, of Pendleton; and Judge C. D. Carr, of Fayette.

Election of Directors.—The meeting then proceeded to the election of a Board of Directors, which resulted as follows: A. L. Greer and E. T. Clarkson, of Covington; Richard Stowers, of Pendleton; G. H. Perrin and Joseph Shawhan, of Harrison; William C. Lyle and B. J. Clay, of Bourbon; C. D. Carr, of Fayette; and Peter Zinn, of Cincinnati.

ABSTRACT OF PLAINTIFF'S EVIDENCE.

DR. JOHN E. STEVENSON.—Member of the City Council of Covington from 1857 to 1861, and as chairman of the committee for that purpose, consisting of C. H. Moar, I. N. Longacre, and himself, cast the vote of that city on its stock at the election of directors in December, 1859. He gave a somewhat similar account of the meeting to that of the *Cincinnati Enquirer*, besides this additional incident:

"Mr. Foley came to me, and asked me to step out into the hall with him. I did so. He asked me what I intended to do. I told him I intended to oppose the acceptance of the report, and to favor the electing a new set of directors of the Covington and Lexington Railroad. He said he thought I ought not to do so; that these men were my friends and acquaintances, and I had better not do it. I replied to him, that it was my duty—my sworn duty to do so; that I had been sent there by the City Council to vote their stock, and I must protect the interest of the city, and I intended to do so. He again urged me not to do so, and I told him I should; and he then left me, saying I could do as I liked."

After the sale, several eminent attorneys sent communications to the Council, advising that the sale was illegal, and proposing suit. Witness urged "upon the Council several times the necessity of employing counsel to look after the city's interest in said road, but could not obtain concert of action, in consequence of opposition," "some members of the Board opposing the measure, chief among whom was the President, Mr. William Ernst."

Witness further said: That so far as his knowledge extended, after Mr. Bowler became a director, "he appeared to be the leading spirit in the management of the road, and he was so regarded by the community."

WILLIAM H. CLEMENT.—From 1844 to 1857, Superintendent and Engineer of the Little Miami Railroad—from the latter date until 1860, General Superintendent of the Ohio and Mississippi Railroad, and from that time until 1867, President of the Little

Miami Railroad Company. At the request of the President of the Covington and Lexington Railroad Company, in the Autumn of 1858, he made an examination of the entire road. In addition to his personal examinations of track and bridges, he had "estimates and examinations made by a competent engineer." He referred to his REPORT AND ESTIMATES, which he made at the time, for particulars, and the same is appended in full. Being asked to draw a comparison between the Little Miami, at the time he took control, and the Covington and Lexington, at the time he made his examination, he made answer as follows :

"At the time I took charge of the Little Miami Road, as Superintendent, it was laid with a strap-rail on wooden stringers. It was unballasted, and otherwise what would now be considered in a very unsafe condition. The company was almost without credit, and the road was shortly after placed in the hands of a trustee, in order to prevent its property from being sacrificed for the benefit of its creditors. At the time I examined the Covington and Lexington Railroad, it was laid with a good T iron, and in every other respect it was in much better condition than the Little Miami Railroad at the time I refer to. I refer to track, iron, bridges," etc.

CINCINNATI, O., October 8, 1858.

JOHN T. LEVIS, ESQ., PRES. KY. CENTRAL R. R., *Covington, Ky.* :

DEAR SIR,—In compliance with the request contained in your note of the 26th, I have made such personal examination of your road between Covington and Paris, as an outward trip by the regular passenger-train, and return trip by special train, running slowly, and stopping at such points as I desired, would allow ; and have also obtained from the officers of the company, and by the aid of a competent civil engineer, employed for that purpose, other needful information, and submit the following statement of its condition, together with an estimate of the cost of completing the road, for your consideration. In making up the estimate, I have confined myself to what I supposed to be the substantial wants of the road, believing that a good track, sufficient equipment for the business, and necessary conveniences for working the trains with safety, regularity, and economy, are of more consequence to its future success than extensive structures for depot purposes, which under other circumstances might be found desirable. I found the road-bed and masonry substantially constructed, and generally in good condition. Some few of the bridge landings have not been entirely filled up, short pieces of trestle-work having been used as a substitute for earth, from fear that the masonry of the abutments might be injured by the pressure of the embankments while the work was new. Now that the embankments have become fully settled, I do not think any danger need be apprehended from this cause, if the work is carefully done. The embankments and excavations are generally of ample width and up to grade, but in some places require an enlargement. The amount of work in this particular, as well as at the bridge-landings, is unimportant, as the earth taken from the ditches and slips, which at places need attention, will furnish all the materials required for this purpose at a cheap rate.

At some points along Licking River, slides of considerable importance occur

during long periods of wet weather; careful watching at such times would prevent danger to trains from this cause; and the extra expense of maintaining the road on that account will be inconsiderable. I would not advise any large outlay to obviate this difficulty, as the slides occur only at long intervals of time, and the ordinary modes of prevention, from the nature of the ground, would be of but little service. An abundant supply of limestone, of an excellent quality for ballast, is found upon the road. Between Covington and Falmouth, the excavations and some portions of the embankments are ballasted, or the material is upon the ground for that purpose. Between Falmouth and Paris this work is mostly done, and no unreasonable delay need occur in perfecting the track, in this important particular, on account of a want of material. The iron rail is in much better condition than I had been led to expect by common report, and will compare favorably with that on other roads in this section which have sustained a corresponding traffic. Sufficient care has not been taken in keeping up the joints of the rails, and removing promptly defective bars, which has doubtless given rise to the impression that the iron was in much worse condition than it proves to be in fact. This is now receiving attention, and will be guarded against in future.

In consequence of the neglect to curve the bars before placing them in the track, when it was originally laid, and the bars not being cut so as to bring the joints opposite to each other, it is much more difficult to keep the track in order than it would be otherwise, and increase materially the wear of iron. This defect is also being remedied as rapidly as circumstances will admit. Forty-one miles of the track is laid with English iron, and thirty-nine miles with iron of American manufacture. The English iron appears to be of a better quality than the American. I have estimated for five hundred (500) tons of new rails, to replace defective bars, extend side-tracks, and allow of a sufficient stock on hand for repairs. In this I include one hundred and twenty (120) tons already delivered, and think the allowance ample. The rail is not fully spiked on the inside of the bar, and I have estimated for fifteen tons of spikes for this purpose, and replacing rails and extending side-tracks. About twenty-five per cent of the ties require renewal; but as I am informed the company have a sufficient number on hand for this purpose, I have left it out of the estimate.

The bridges are in as good condition as could be expected from the length of time they have been in use, without protection from the weather. All will require renewal within the next three years, with the exception of the new bridge at Falmouth, and this should be whitewashed and covered without delay.

It is certainly a misfortune that your company, in common with many others, had not the means to cover your bridges at the proper time, as a large outlay, which must now be made, might have been avoided for many years to come.

With careful attention, and additional bracing from time to time, I think the period of renewal may be extended through two, and possibly three, years. This will afford material relief from the burden which you will be compelled to bear.

I have allowed for increased strength in the structures, and have also made a separate estimate for an iron bridge at Townsend. I think the trestle-work at that place should be filled up, commencing by taking earth from the bottom-lands adjoining, and after this source of supply becomes exhausted, or too expensive, hauling the remainder by trains. A structure of even stone or iron over the

entire valley would be liable to accidents, which an embankment is not, and, independent of the first cost, which would be greater, would become an annual tax upon the revenues for repairs.

By commencing this work now, and prosecuting it steadily, the present structure, with some additional repairs, may be used for the passage of trains until the embankment is completed; but if it is delayed much longer, the whole must be rebuilt:

The same argument will apply to the trestle-work at Stoner Creek, and I think to the bridge at Paris; but I have not examined the last locality with sufficient care to satisfy myself as to the best plan to be adopted, and have, therefore, estimated for renewing the present bridge by a similar structure.

A good wooden bridge, secured from fire by a wash of lime, salted, and properly protected from the weather, will, without a doubt, last from twenty to twenty-five years, and in the end prove more economical, to companies of limited means, than structures of a more permanent and costly character.

I have made no estimate for depot buildings or lands, other than for three principal water-stations. The timber from bridges needing renewal will furnish an ample supply for the erection of car-sheds, wood-sheds, and all the smaller station-houses on the road, and I suppose the more important structures will not be undertaken at the present time.

It is due to your Superintendent to state, that the plans he had adopted and was pursuing, for replacing the defective iron, ballasting the road, renewing bridges, and erecting water-stations, are substantially those I have recommended, and which I have no doubt will be found the most economical and judicious for the company to carry out. Respectfully, W. H. CLEMENT, C. E.

Estimate for completing the Kentucky Central Railroad, between Covington and Paris, and for renewing bridges, etc.

500 tons new iron, for replacing defective rails, extending side-tracks, and allowance for stock on hand for repairs, at \$55 per ton,	\$27,500
Spikes and chairs,	2,000
For completing ballasting, opening ditches, enlarging excavations and embankments, and filling bridge-approaches, exclusive of labor of ordinary repair-force,	20,000
For renewing 3,201 lineal feet of Howe truss-bridge—excluding Falmouth bridge,	\$56,700
Less 20 per cent value iron rods, and other materials that can be used again,	11,340—
Add for covering 3,201 feet of bridge, at \$5,	16,005
Filling trestle-work at Townsend:	
40,000 cubic yards to be carted from side, at 18 cents,	\$7,200
20 acres of burrowing-ground,	2,000
96,000 cubic yards to be handled by cars, at 25 cents,	24,000
2,550 yards masonry, stone mainly prepared, at \$5,	12,500—
Covering Falmouth bridge, 225 feet, at \$5,	1,275
3 water-stations, worked by steam and fitted up for sawing wood, at \$3,000 each,	9,000
2 freight-engines, at 8,000 each,	16,000
(The company own 18—every one in running order.)	
21 freight-cars, at \$600 each,	12,600
	\$195,440
To which may be added, if iron bridges at Townsend are adopted,	11,275
	\$206,715

If a trestle-work is substituted at Townsend for trestle-work again, it will reduce this estimate to	\$160,440
If it is decided that the machinery now on the road will answer the present purposes of the company, the estimate will be reduced to	131,840

ERASMUS GEST.—Wished it understood that he was an unwilling witness. A civil engineer by profession; had experience as a contractor in railroads, as a superintendent and receiver. At the time of giving his deposition was President and general manager of the Cincinnati and Zanesville Railroad. In the year 1858, he made an examination of the condition of the road with a view of securing a lease thereof, in regard to which he says:

"I can not recollect the detail of what then passed. My communications were, I think, mainly with Mr. Bowler, who, if I remember correctly, was the Executive Committee, or chairman of such. I made one or more in writing. After some weeks, I found a hitch in the business—that I was avoided, although on several occasions the interviews were terminated by Mr. Bowler's statement that he would send for me, or see me again. I really do not think I had to do with any of the other directors or officers, as I understood the business was left almost entirely with him, he having such a large individual interest in the property or its securities. . . . I at some period either before the sale, or subsequent, but before the confirmation, made a formal proposal to lease the property. If this formal offer was made before the sale, then it was made to Mr. Bowler; if after, and before confirmation, I think to General Coombs, or some one acting with him. In either event, the substance was formally made to Bowler."

The witness identified a copy of his proposition to lease the road, and made the same an exhibit to his deposition. It can be found on pages 188–9 of the printed record, and was, in substance, to lease the road for ten years, and during that time to pay all interest and debts of the road as they matured—keep the road in repair, and make such additions thereto as circumstances or increase of business might require—all from the earnings of the road; if they were not sufficient, to advance the necessary means therefor, and at the end of the term the same to be a debt against the road, to be settled by bonds or otherwise, as might be agreed upon. "It was my judgment that the road could be made to pay its interest on its funded debt promptly; likewise, the accruing interest on its floating debt, as well also as the principal of the floating debt, in periodical payments running through the duration of lease. In addition to which, also the working expenses, taxes, and a large compensation to myself."

R. M. SHOEMAKER.—Civil engineer and railroad-builder, and was so engaged since 1833. Was chief engineer of the road from June, 1852, to the Summer of 1854. After leaving the road, he became the owner of \$25,000 or \$30,000 of its second mortgage bonds; and was one of the committee with Henry Hanna, William Ernst, and William B. Smith, to confer with the directors in regard to the non-payment of interest past due. Witness went with committee over the road (Mr. Bowler accompanying them), to examine its condition, and to confer with the directors and their attorney at Lexington. "Mr. Bowler claimed to be a large bondholder, was a director, and was the leading man in the company, so far as I could see." The committee were disposed to indulge the company, but received no other proposition, in return, that witness recollected, except the terms of the "\$800,000 circular." He recollected that in passing over the road, Bowler's general tone was more disparaging than the condition of the road justified. Mr. Shoemaker further said:

"I did not make any specific estimate myself, nor do I think the committee did; but we had handed to us (by the President of the railroad company, I think) a report of Mr. Clement, which contained an estimate of the cost of putting the road in good repair, which I had in my possession most of the time while passing over the road; and from my former knowledge of the road and reading that report, and examining the road as I rode over it, I was satisfied that Mr. Clement's estimate was very liberal, and that the road could have been put in good running order for less than the amount estimated by him."

RALPH N. REYNOLDS.—Commenced railroading in 1851, and had continued in that business up to the time of taking his deposition, when he was Assistant Superintendent of the Nashville and Decatur Railroad. Was Roadmaster on the Covington and Lexington road from August, 1857, until January, 1864, and as such, had charge of the track and all matters connected with it, the purchase of wood and ties. When witness took control, the road was very much out of repair; but it improved rapidly afterward, in ballasting, new ties, and ditching. At first the wages of the workmen were not paid regularly, and the credit of the company was not good; but soon after, the wages were paid promptly, as well as the cost of all supplies of wood and ties. The credit of the road became good, and "before the sale of the road I could get credit for any thing we wanted." Witness did not recollect of being asked to approve of the

"\$800,000 circular," but if he had have been, he would have declined. The Superintendent was "decidedly against the circular—that it was unnecessary." "In my judgment, the circular and the sale were one and the same thing—the one the consequence of the other." "I do not think that the road at that time required the expenditure of any such sum as is set out in that circular." "I do not think that any such sum of \$800,000 was required to put the road in first-class order." The witness continued: "About the time of the issuing of the circular, I was requested by Mr. Bowler to substantiate some statements he had made in that document, which I declined to do. He asked me, 'Did you not tell me that the track required new iron?' I replied, 'No, sir.' He repeated the question, with a like answer." Mr. Bowler was excited in his manner at the time. He "persisted in making figures to lay the entire track with new iron and ties. That was not required." As to the "\$800,000 circular," witness repeated, "that it was altogether unnecessary to expend that amount on the road. The road, after the sale, was kept and carried on in the same manner as before the sale. The plan of renewing the iron," by purchasing 500 tons of new iron, and, after putting it down, re-rolling the old iron taken up to give place to the new, and then in turn putting down the re-rolled iron,—this the witness explained to be the custom on all roads. On cross-examination, witness stated that the character of the soil, and the location required much labor on the road while he was connected with it; that the track required additional ballast, and the depot accommodations not sufficient. Nearly all the improvements after the sale he would classify as ordinary repairs; but the filling of Townsend Valley, and the building of one or more bridges were extraordinary.

J. B. VAN DYNE.—Was conductor on the road from 1854 to 1862, from which time was master of transportation until January 1, 1864. Previous to his connection with this road he was conductor on the Little Miami and the Ohio and Mississippi Railroads. The witness thus describes the condition of the road at the time of the sale:

"The general condition of the road was good. There was needed some improvements in the way of warehouses and some renewal of iron, but the road

could get along for years without any great outlay for depot buildings. The rolling stock at that time was sufficient for the accommodation of the business. My recollection is, that the bridges at that time were all in safe order, but some of them would require renewal in the course of a few years. The condition of the road would compare favorably, at that time, with the generality of the Western roads. There was some work needed on the sides of some of the cuts, in clearing them out; but that could be done gradually."

Witness went from the Ohio and Mississippi to the Covington and Lexington Railroad, and always considered the latter the better road of the two—it had a better road-bed. At the time he left the road, the track was not as good as when sold. Some of the bridges were better. The depot buildings and water-stations were not as good as when witness went on the road. The rolling stock was somewhat increased. The loss during the years 1862 and 1863 from destruction of bridges and rolling stock would certainly not exceed \$50,000.; and during the same period the earnings averaged from \$65,000 to \$80,000 per month. At the time of taking his deposition (June, 1868), there were some two hundred and fifty feet of the Townsend trestle-work still standing. The improvement is by filling and masonry. At the south end there was a rock abutment or a wall. It never was completed." "The trains are carried over this work by trestle." The only difference between the work when sold and when witness's deposition was taken, was that the trestle was shortened about six hundred feet. "There were no serious accidents on the road previous to the sale;" and it compared favorably with the roads entering Cincinnati. On cross-examination, the witness said that at one point there was a place where the road sank every year, and had to be raised; and in cases of "very heavy rains," the track was displaced for a hundred feet out of line. Ordinary rains did not affect the road. The road was not perfectly ballasted when sold; and up to the present time "is not thoroughly ballasted as a first-class road." At the time of sale, "there was already a depot in Covington. It was not a first-class house. I do not know of property being lost for want of a secure place to put it in."

The witness thought Mr. Withers a very discreet man—"a man of good judgment as to the management of the road." He was deceased at the time of taking the deposition. Mr. Bowler "was a very active member—a very influential member of the

Board." "He seemed to have a controlling influence over the other members of the Board." "The impression always was, that Mr. Bowler was to be consulted before any important action was to be taken. He was what was known as a controlling spirit."

THOMAS D. DAVIS.—Was master-machinist from June, 1855, to 1861. In 1857 and 1858, the condition of the machinery was improving. In 1858, 1859, and 1860, it was got in "pretty good condition. We considered it sufficient for the business offering. We had very few break-downs. When we were called on to send an extra engine or train, it was always in condition to go out. The machinery was getting better all the time the last three years before I left. It was considered in good condition when I left. We made as regular trips on the road at that time as on any other road in the country." "At the time the road was sold, it was in good condition." "It was in about the same condition when I left that it was at the time of sale." Messrs. Withers and William H. Gedge gave witness orders to have the machinery put in good condition before the sale. After the sale, Mr. Gedge asked if expenses could not be reduced; and if so, to reduce them, as they had a good deal of money to raise. A day or two after the sale, conversed with William H. Gedge about his purchase of the road, when he told what was paid for it. Witness said "to him that he got it very cheap. He said, Yes; but he would have paid a good deal more, if necessary. He said, 'It was our calculation to have the road, anyhow.'" About 1870, the company had about half the property purchased from Walker, in use.

GEORGE M. CLARK.—A civil engineer by profession, and served in that capacity on the road four or five years, from 1850. Was Secretary of the company from 1855 to 1859. Was also ticket-agent during the latter three or four years, and kept a supervision of the books of the company. Was employed on the road as ticket-agent and book-keeper until the Fall of 1861.

In the years 1857 or 1858, made examinations and estimates as to equipment, ballast, rails, and ties of the road, which were shown to Mr. Clement, and used by him. Witness also made

the tables in the annual reports of the Secretary for 1859, and verified their correctness. The \$13,557.50 shown in the expenditures of 1858, was a balance paid Samuel J. Walker after a final settlement with him as Treasurer of the company.

Mr. Bowler "seemed to take a very active part as director of the company." "Was in the office of the company every week, and sometimes every day, while I was Secretary of the road." "Mr. Bowler exercised a controlling influence over the affairs of the road."

The necessity of a depot in Covington was often discussed by the directors, and witness thought plans were submitted, by which the cost was to be about \$25,000 or \$30,000. Afterward, a building was put up for a depot by a private individual, and rented to the company, with the privilege of keeping an eating-house adjoining. At the time of taking the deposition (January, 1869), the passenger-trains stopped in Washington Street, opposite the depot mentioned. "Previous to the sale, the cars stopped, as now, in the street, but further north, and no rooms were then provided for the passengers.

On cross-examination, Mr. Clark said "the original contracts made for the construction of the road were at a very low figure;" and, so far as he had "experimental knowledge, no road of equal difficulties had ever been graded at less cost." "The equipage of the road was made at very favorable terms; and, on the whole, I can not believe the cost of the road, including the equipage, could have been less." During its construction, the company was often short of funds, and liabilities were incurred by the directors. On those liabilities the company always paid the discount and interest; and, to the best of witness's knowledge, the \$71,328.33, mentioned in the exhibit of expenditures for 1859, paying off the last of these debts. Bowler indorsed for the company, but witness never knew of his losing any thing thereby. The purchase of the real estate from Walker was also a compromise by which the company saved a large expenditure for the construction of a stone arch through the college-grounds.

JOHN T. LEVIS.—Was elected director in the Spring of 1854, and so continued until December, 1856, when he was elected President, and so continued until the sale. After that, was

employed by Mr. Bowler, and had the general charge of the road until January, 1861. At that time "a company was formed, consisting of R. B. Bowler, James C. and Wm. H. Gedge, R. Stowers, and myself, in which company we all, except James C. Gedge, took part in the management. I continued therein until January, 1863, when the present [January, 1869] company was formed, and I retired from the road." For the terms of the formation of that company, Mr. Levis referred to the Exhibit to the Petition—Bowler's conveyance to them. "A separate agreement was made with each of the parties by Bowler, for the interest owned by them. The road was put in as follows, namely: The company to pay all the mortgage bonds, and a stock was made for \$1,100, in stock, of which I was to have \$20,000. The mortgage indebtedness was \$1,737,000—the shares were \$100 each. The contract between myself and Bowler was destroyed when I retired from the road." There was rolling-stock put on the road every year witness was connected with it; and in his judgment it was always needing more. During the years 1860, 1861, and 1862, the road, as to economy, was managed "very closely, nothing being expended unnecessarily in any way." "The earnings of the road continued to increase, from the opening of the road up to the time I ceased my connection with it." Being asked the question as to what profits were divided for the years 1861 and 1862, the witness said: "For the year 1861, a dividend of six per cent was declared. I can not state if a dividend was declared for 1862; but my recollection is, that the profits for that year were some five per cent, but whether declared or added to the funds of the road, do not know. I got my settlement at that rate." Mr. Levis thought the road less valuable when the company was reorganized in January, 1863, as it had suffered from the war. In January, 1861, when he took his interest therein, he "thought it was worth what it was put in at; namely, \$2,837,000." In another part of his deposition, he explained that his retiracy from the road had nothing to do with its profitableness, but was owing to other causes. "The effect of the war was to throw a large transportation over the road."

The witness had before him a copy of his own deposition, taken in the foreclosure suit on the 9th of May, 1859, and being

asked as to the floating debt at that time, adopted his former answer to the same question, namely :

"The floating debt of the company is about \$138,000. The directors are bound on about \$95,000, for which Walker has undertaken to pay, in the arrangement heretofore referred to. In addition to the above, the President and one of the directors are bound on a bond to the Kenton Circuit Court for \$4,204, bearing interest since March last. This does not include the amount for supplies for the last month, nor for the labor for same time, amounting to \$14,573.45."

Being asked in regard to an estimate for running the road for two years, made by himself at the time of taking his former deposition, and also as to an estimate of the yearly earnings and expenses of running the road, also made by him, and his explanations thereof, Mr. Levis adopted and quoted from his deposition of 9th May, 1859, as follows :

It will require, for depot buildings, offices, and side-track, and paving	
around depot at Covington, about	\$25,000
Five hundred tons new railroad iron, \$60,	30,000
Repairs bridges along the line, say	20,000
Depot and repairs of ground at Lexington,	10,000
Depot-ground at Lexington,	2,000
Ballasting road,	20,000
Filling up Townsend Valley,	60,000
Two new engines, \$8,000,	16,000
Twenty freight-cars, \$650,	19,500
Two wood-houses,	1,500
Two water-stations,	6,000
I think it safe to estimate the receipts for the year ending 1860 (Nov.),	475,000
The expenses of running and ordinary repairs will average about 55	
per cent of earnings; I put it at that time at same price,	260,000

"All of the items named above are necessary to the running of the road. I do not think any of them can be dispensed with beyond the period named, viz.: two years. Some of the improvements can be dispensed with, but not with interest to the company. The road can run without ballasting. It can be got along with the present machinery for a short time. The trestle-work at Townsend could be renewed, as by a similar one, but I think it would not be economy to so make the repairs. The original cost of the trestle-work at Townsend was about \$12,000 for the wood-work. Of the masonry I can not state the cost. It is possible to run the road without the proposed outlay for depots; but at Covington it adds largely to the cost of labor and damages, and most of the work is done in the streets on sufferance. At Lexington it could get along after a fashion, for a time, better than at Covington, but to great disadvantage" (a).

Mr. Benton negotiated the sale of the third mortgage bonds, and it was approved by the directors. At the time, it was difficult to make sales of railroad bonds.

(a) This deposition, of 1859, was taken at the instance of income bondholders, who resisted the sale of the road.

On cross-examination, Mr. Levis stated that the affairs of the road were economically managed, and the road built at low prices. That in 1857 and 1858 the road had not the "means to make the necessary repairs, supply it with rolling stock, pay current expenses, and interest upon its bonded indebtedness. He instanced a case where the right of way had not been paid for, between Paris and Lexington. The estimates of the "\$800,000 circular" were made after careful examination; and he was satisfied they were as low as would be sufficient to finish and make the road first-class; and on re-examination in chief, in answer to the question if he at that time (January, 1869) considered the road first-class, in regard to track, equipments, depots, etc., replied that he did "not consider it a first-class road in any respect." The attention of the stockholders was called to the condition of the road at the annual meetings. In December, 1858, Mr. Bowler made a proposition to assess the stock, to which there was no response. "The stockholders were made aware of all the difficulties of the road, but I do not recollect the special details made to them. They were aware of the suit pending against the company." "There was no interest paid, except on the first mortgage bonds, after November 1, 1858. The company had not funds to pay the interest and meet the current expenses and repairs of the road, and concluded to keep the road in operation, and let the coupons pass." "Eminent counsel was employed" in the foreclosure suit, and every defense they could make was made; and witness never knew or heard of any simulated defense until after the sale of the road. "Bowler resisted the sale of the road, being a large stock and income bondholder. He wished to protect that interest, and employed counsel to take care of it, and desired a receiver be appointed for the road." On re-examination in chief, witness did not know if Mr. Bowler's attorneys argued only as to the priority of his income bonds or not, but thought it "was to prefer income bonds, and had nothing to do with the mortgage securities." After the sale, Mr. Bowler offered to restore the road to the stockholders, at cost; but what he meant by "cost," Mr. Levis did not know.

LEWIS S. ROSENSTIEL and PETER J. SULLIVAN testified to Bowler's calling on them, and requesting them to vote for him

as director when he was first elected, which they did, or gave him their proxies.

JOSEPH C. BUTLER.—Previous to the sale of the road, he owned between \$50,000 and \$60,000 of the third mortgage bonds, which he bought from Samuel J. Walker, and sold to Bowler and Thomas D. Carneal, also before the sale. The rate to Carneal was fifty cents on the dollar, and to Bowler about the same. The sale to Carneal he supposed to be really for Bowler, as he produced an order, and paid for them.

RICHARD W. KEYS.—Was the owner of between \$50,000 and \$60,000 of the third mortgage bonds, which he bought from Walker at about seventy-five cents on the dollar, and paid for in real estate. During the troubles of the road, visited the office of the company in Covington to get information concerning the road, and had interviews with Messrs. Bowler, Levis, and Withers. Could get no satisfactory information from the two former, outside of the "\$800,000 proposition." Was not willing to agree to this; but, with other bondholders, was willing to aid the road. The information he got from Mr. Withers is thus given:

"About that time, Mr. Withers called at my office one day. He stated that this proposition, of \$800,000, of the directors was totally unwarranted by the condition of the company. He also stated that there was sufficient wood, surplus wood, along the line of the road, that could be brought to market and sold, if the directors would permit, to pay the interest on the bonds, then due, or about to become due, I do n't remember which. He also stated that money had been expended in anticipating payments on real estate, and he thought the whole object was to make as bad a showing as possible of the affairs of the road."

Mr. Withers also told witness "that the road was in fair condition, and that it could be improved gradually, till it could be brought up to a first-class road, by the expenditure of a part of the net earnings upon it."

The witness gave this account of his interviews with Mr. Bowler:

"I had several interviews with Mr. Bowler, at his store on Pearl Street, by his own appointment. The first interview I had with Mr. Bowler, he asked me if I would exchange my bonds for his property on Pearl Street, and led me to believe that we could make a satisfactory exchange; but in subsequent interviews he told me that the bonds were worthless, and would not buy them. That is about the sum and substance of our negotiations. These interviews took place a short time prior to the decree of court."

The witness further stated that Bowler's words to him were, "Your bonds are perfectly worthless;" and that this terminated negotiations. "It was the fear of being sold out, and losing every thing I had in the road, that induced me to sell; and this was the only reason that induced me to sell." Witness accordingly sold his bonds to A. L. Mowry at thirty-seven and a half cents on the dollar, flat, or, in other words, with the interest thrown in.

SAMUEL B. KEYS.—Had a small interest in his brother Richard's bonds, and made efforts similar to his, to procure information touching the affairs of the road. He had interviews with Bowler, Levis, and Withers, with the same results as those already given. This witness says:

"My interviews with Mr. Bowler and Mr. Levis, especially with Mr. Bowler, were for the purpose of getting them to indicate some course of action which would suit them, and in which the bondholders and stockholders could unite, for furnishing the money necessary to pay the interest on the bonds. In each one of these latter interviews I was met squarely by Mr. Bowler, as also by Mr. Levis—that the road was in such a bad condition that it was doubtful if it then could be operated safely, and that it was useless to do any thing more than to have the road sold. The result of all was, that being entirely discouraged, I advised my brother to sell his securities for whatever he could get for them."

The witness further stated, that he did "make to Mr. Bowler and to Mr. Levis, separately and together, various propositions for the raising of money for the use of the company in the payment of interest, and for the funding of a portion of the interest on the third mortgage bonds."

G. W. C. JOHNSON.—Was a wood-dealer in Cincinnati in 1858 and 1859. The supply of wood at that time came mostly from the Ohio and Licking Rivers, and it was worth, at the river, in Cincinnati or Covington, about \$4 per cord, and delivered, from \$5 to \$5.50 per cord (a).

PETER L. BROWN.—Was formerly of the firm of Joseph C. Butler & Co., in the wholesale grocery business in Cincinnati, in the years 1858, 1859, and 1860. During that time, owned

(a) A note to the table of "*Transportation Receipts and Expenditures for the year ending October 31, 1858*," in the Annual Report, says: "There should be deducted from operating expenses the cost of six thousand cords of wood, charged in the above wood account, being that much more paid for than was used—\$12,000.

twenty-nine third mortgage bonds of the road, of which \$8,000 was bought of William Ernst by an exchange of property in Covington at about seventy-five cents on the dollar, and the balance were purchased of Samuel J. Walker at about fifty-five cents on the dollar. Had frequent conversations with Mr. Bowler in regard to their value. He exhibited to witness a paper showing the amount of the first and second mortgage bonds, and the interest due and unpaid on these bonds, "by which he proved that if the road brought \$1,750,000—all he said it would bring—it would have been less than twenty-five per cent on the dollar for the third mortgage bonds in which I was interested." "The statements which Mr. Bowler made induced me to sell my bonds, believing that we might be possibly cut out altogether." This sale, witness thought, was in April, 1859, and yielded witness less than thirty cents on the dollar.

"Some two or three days subsequent to the sale of the road, while on my way home to Clifton, Mr. Bowler overtook me on Vine-street Hill, and invited me to take a seat in his buggy. Immediately on taking my seat, Mr. Bowler commenced a conversation in relation to his recent purchase of the Covington and Lexington Railroad. He exclaimed, in high glee, or in very good humor: 'Brown, you were right!' To which I replied, by asking him what he meant? To which he replied, 'In relation to the value of the road.' Said he, 'Do n't you recollect that you always contended that the road was worth from two to two millions and a half dollars?' I expressed surprise, and asked him 'how he came to contend that the road was worth \$1,750,000, when he, at the same time, believed it was worth \$2,500,000?' To which he replied, that he had his own interest to take care of. And in the same conversation stated, that he had authorized Mr. Gedge to bid up to \$2,500,000 for the road."

On cross-examination, the question was asked Mr. Brown if he knew the directors of the road, other than Bowler, at the time he sold his bonds; and if so, what were their reputations for business capacity and integrity? Witness had known William H. Gedge and Levis for years, and their reputations as business men and men of integrity were good until they became associated with Mr. Bowler in the railroad; after which time, in witness's opinion, they submitted themselves to the improper influences of Mr. Bowler. Had been on good terms with him up to the time of the conversation in the buggy, which conversation terminated all intercourse. "That convinced me that he had played a deep and dishonest game."

A. L. MOWRY, manufacturer and banker.—He explained that his deposition was taken, August 24, 1860, in the litigation

between Bowler and Vallette, concerning the priority of their respective bonds. Having a copy of that deposition in his possession, and the questions put to him being mostly the same as those asked him in 1860, he adopted the answers given in his former deposition as his answers in this case. The witness said:

"I bought thirty-seven of third mortgage bonds of the Covington and Lexington Railroad from Samuel B. Keys. . . . Mr. Bowler called on me some time after the purchase, and told me that he had heard that I had purchased some third mortgage bonds of the Covington and Lexington Railroad. He said that he had come to inform me that I had made an unprofitable purchase. He went on to state his reason—giving as his reason that the road would have to be sold, and sold for cash, under the second mortgage bonds. He stated that the third mortgage bondholders would have to raise the money for the road, and pay up the whole second mortgage. In the conversation he stated, that had he known that I wished to purchase bonds, that he would have sold me his bonds for a less price."

Mr. Mowry verified the following CONTRACT BETWEEN BOWLER, VALLETTE, AND MOWRY, to buy the road:

"Whereas, a suit is now pending in the Circuit Court of Fayette County, Kentucky, in the name of James Winslow, against the Covington and Lexington Railroad Company and others, the object of which is to sell the said road and all its rights and franchises for the payment of debts secured by mortgages, and also to declare and ascertain, in view of such sale, the several liens upon the property of said company, and their respective priorities; now, the parties hereto, in view of such sale, and for the purpose of protecting and securing their respective rights, and of compromising and preventing any conflict as to their said interests, and to avoid the necessity for a continuance of litigation after the decree or order of said Court, upon appeal or otherwise, do agree and mutually bind themselves, that in the event they or either of them, or any one in behalf of them, shall purchase said road, its rights and franchises, at any sale or disposition thereof, which may be had or made under the order or decree of the said Court, such purchase shall be made and such property shall be held, and any price to be paid, and any costs, charges, or expenses, shall be contributed and borne for the benefit of and by the said parties in the manner and proportion and upon the conditions following:

"R. B. Bowler holds certain securities of the said company, known as its third mortgage bonds, to the amount of three hundred and sixty-seven bonds of \$1,000 each, and certain other securities known as income bonds, to the amount in the aggregate—the bonds being some for \$500 each, and some for \$1,000 each—of \$369,000. Henry Vallette holds of the said third mortgage bonds one hundred and thirty-three bonds of \$1,000 each; and A. L. Mowry holds of the same bonds eighty-one bonds of \$1,000 each. To ascertain the extent and amount of interest and benefit of the said parties, and their proportion and share of contribution, in the said property and purchase, the third mortgage bonds shall be estimated and rated at \$1,000 for each bond, and the said income bonds at the sum of \$166,050 for the whole, or in that proportion; and the said R. B. Bowler shall be interested, and shall contribute in and to the amount of his third mortgage and income bonds so estimated and rated, and the said Henry Vallette and A. L.

Mowry shall be interested, and shall contribute in and to the amount of their third mortgage bonds so estimated and rated; and, if all or either of the said parties shall at any time, in view of such sale and the protection of their interest, purchase other of the said bonds, whether third mortgage or income, than those now held, the same shall be considered as purchased on joint account, to be held and the purchase-money for them contributed by the parties in equal proportions. The said parties mutually bind themselves, that they will make no disposition of the bonds now by them respectively held, so as to enable any person or persons claiming the same to defeat the object and intent of this agreement, and only to a person or persons to be substituted and agreeing to be substituted to a proper proportion, not less in amount than \$1,000 of the interest of one of the parties hereto; and in the event of the purchase of the said property under this agreement, evidence of the interest and share of the respective parties shall be so made and framed, that a certificate may be given to any person or persons to whom an interest shall have been or may be transferred, showing the extent and proportion of such interest. It is also agreed that neither party shall make any purchase of other of said bonds than those now held, except with the consent of the other parties.

"Signed by the said parties, this 9th day of August, 1859. ~

"R. B. BOWLER, HENRY VALLETTE, A. L. MOWRY."

On being questioned concerning the history of the contract, and what became of it, Mr. Mowry proceeded:

"Soon after the contract was signed, Mr. Bowler commenced talking to me in regard to our being associated with Mr. Vallette in the contract. He said it was utterly impossible for us ever to work together, and represented to me that he was very anxious to sell out his securities rather than carry out the contract according to his agreement. I told him that I was satisfied that the agreement could be carried out between us three if we would only live up to it, and it would make a profitable investment. But, inasmuch as he was a director of the road, and had been for a long time, I should be governed, in part, by what he said in regard to the value of the securities. Mr. Bowler came to see me soon after I had this conversation with him, and told me that there was a gentleman in the city who represented a party in Kentucky, that wished to buy all our securities; that was, his, mine, and Vallette's, if we would sell them. I asked him who the party was? He told me it was Thomas Carneal, from Frankfort. He said that he had made up his mind that there was no use for us to try to work together with Vallette. He therefore made up his mind to sell his securities, and advised me to do the same. He requested me to go down to the Spencer House with him, and he would introduce me to Carneal. I went down to the Spencer House, saw Carneal, and had a conversation with him in regard to the sale of my securities. I told Mr. Bowler, at the time, that I should be governed entirely by his action in regard to the matter, and we made a proposition to Mr. Carneal to sell out our bonds at fifty cents on the dollar, giving him until the last day of September or first day of October to accept our proposition. Mr. Carneal accepted our proposition at the time agreed upon, and I took my bonds—all that I owned at that time—to Judge Gholson's office, to deliver them according to agreement. I took only seventy-seven bonds at that time. Mr. Bowler objected to the delivery of said bonds to Mr. Carneal, giving as his reason that it was not all the bonds that I previously had represented that I owned. I told Mr. Bowler that that was all

the bonds that I could dispose of, as I had simply represented four bonds that belonged to Mr. Gaff. Mr. Bowler said he would have nothing to do with it, unless I should deliver the whole eighty-one bonds, which I refused to do at that time; but subsequently I took a part of other bonds and delivered the eighty-one."

. . . "The only reason that induced me to sell out, was the management of Mr. Bowler, as I had no difficulty with Mr. Vallette, and did not anticipate any."

. . . "Mr. Bowler told me that he (Mr. Carneal) did n't wish to buy Vallette's bonds at that time, as, if he bought his (Bowler's) bonds and my bonds, Vallette would have to sell his at any price he had a mind to give him."

"After Mr. Bowler and I had contracted to sell our bonds to Mr. Carneal, he came to me and said Mr. Carneal was going to make Mr. Butler an offer for his bonds; that Mr. Butler had proposed to sell out at the same price I was to have for mine. He (Bowler) wanted I should sign a paper certifying that the price he and I were to have for our bonds was forty-five cents on the dollar, flat, at six, twelve, and eighteen months, with all the coupons past due thrown in. I told Mr. Bowler I should sign no such paper; that if Mr. Butler asked me, I should tell him the facts, which was, that I was to sell my bonds at fifty cents on the dollar [flat] at six, twelve, and eighteen months, with interest at six per cent."

On cross-examination, Mr. Mowry said Mr. Bowler represented that he was selling "out to Carneal. I afterward ascertained that he was not selling out;" and on re-examination, further said:

"Mr. Bowler and myself made an agreement to sell all the bonds we owned to Thomas D. Carneal, and appointed a day to make the delivery to Mr. Carneal. I went to Judge Gholson's office to deliver according to agreement. Then I ascertained from conversation between Bowler, Carneal, and myself, that Bowler was not acting in good faith toward me, and was really the purchaser of my bonds, through Carneal, instead of selling his bonds to Carneal, as he had previously agreed with me to do."

HENRY VALLETTE.—In 1859, owned some \$50,000 of the second, and \$129,000 of the third mortgage bonds of the road; and was a defendant in the foreclosure suit. The "Proposition to Bondholders" destroyed confidence in the directory on the part of the bondholders. "The affairs of the company, after this proposition was made to the bondholders, seemed to be managed by Bowler and President Levis. The bondholders believed that Bowler was to pay the debt of the company on which the directors were liable as indorsers, and that Bowler was to have no opposition from them in buying the road."

"Bowler said, they determined, of themselves, to take the revenues of the company and apply them to relieving the directors of their liabilities. But public indignation was excited by the publication of this proposition to the bondholders. It degraded the bonds, and enabled Bowler to buy a large amount of them at very low prices. Bowler held many third mortgage and some income bonds, which he had bought at high rates, before the railroad company suspended the payment of

interest on their bonds; but after the publication of this proposition, he bought a great many second mortgage bonds for fifty-five cents, third mortgage for thirty-five cents, and income bonds for ten to fifteen cents on the dollar, which was the general market price for these bonds from the time they were degraded by the publication of the circular or proposition referred to, until the decree was made for the sale of the railroad.

"For many months before the trial of the case, it was apparent to me, and I think to all interested in the result of the trial, that the defense of the company was simulated and affected, and not an earnest defense. I think this was public sentiment at the time in Kentucky. I took an active part in defending the third mortgage bonds, and in trying to get a Receiver appointed to save the road for a while, before a sale was ordered."

Witness explained that he paid his attorney for services in the case a total of \$3,800. "I acted in the trial against the second mortgage bonds. The holders of them wanted a sale of the road. I opposed at that time." "Bowler always talked down the bonds of all kinds, during the pendency of the suit, and was not particular what he said of them." The holders of third mortgage bonds were persons of means. "Bowler's diplomacy was always to make the appearance of wishing some reasonable arrangement to relieve the company; but it was evident he really wanted a sale of the road, and intended to buy it. That was believed by the bondholders generally."

Being questioned as to an application made by him for the continuance of the foreclosure case at the June term of the court, Mr. Vallette said he had made and filed an affidavit for that purpose, dated the 22d of June, 1859, and gave this explanation of the circumstances attending the same:

"Mr. Bowler had told me some time before that he was not going to defend the priority of the income bonds over the third mortgage bonds, as he held more of them than the incomes, and that Mr. Hunt, who was the reputed attorney of the railroad company, would defend the third mortgage bonds. Mr. Bowler also said that the case would not be tried at the June term, as none of the parties were ready. I relied on these statements of Mr. Bowler, until about a month before the sitting of the court, when I began to see they would bring on a trial, if they could, and called on Mr. Smith, who was the agent for the second mortgage bondholders, and got his promise that we should not be forced into a trial, unless we were ready. My attorney, Mr. Buckner, did not feel competent to defend the case alone, and I, with Mr. Walker, who held some third mortgage bonds at that time, had employed Governor Morehead to assist Mr. Buckner. On the day of trial, Bowler tried to bring on the case, and Smith assisted him, and denied what he had agreed to do for us in that behalf. Governor Morehead was not present, as we none of us expected a trial to come on; and I made the aforesaid affidavit, which induced the court to continue the case."

Mr. Bowler made a counter-affidavit, which was sworn to by him on the same day, and filed in the cause, opposing a continuance. The witness identified a copy of it, and the closing part of it is as follows:

"That so far from said Vallette being unprepared to defend the third mortgage when this affiant informed him that he would go for a sale of the road, the said Vallette had already employed Judge Buckner as his attorney. The conversation occurred in this way, namely: He told affiant that he had been to Lexington, had employed Judge Buckner, and would apply for a Receiver. Whereupon affiant replied, that if that was the case, rather than the road should go into the hands of a receiver, he (affiant), as a holder of third mortgage bonds, would unite with the second, and go in for a sale of the road. R. B. BOWLER."

In regard to his contract with Bowler and Mowry to buy the road, Mr. Vallette said: "After the case had been argued, I thought the court would order a sale, and entered into an agreement with R. B. Bowler and A. L. Mowry, by which I consented to a sale of the road being made." "I went into the agreement, supposing a decree to sell the road would be made (as my attorney told me he had no doubt that the court would order a sale), as a matter of self-preservation." Difficulties arose, and the agreement was abandoned after the decree for sale.

"Judge Gholson was the principal attorney of Mr. Bowler. Mr. Hunt, though nominally the attorney of the railroad company, was, to all appearances, Bowler's attorney." "The drift of Gholson's argument was to sustain the incomes as prior to the third mortgage bonds."

Mr. Vallette was shown an estimate made by him years before, of the cost of Bowler's investments in the road; but he did not attach any importance to the paper. It showed them to amount to \$330,250.

Cross-examination.—"I did join in the desire to Winslow to institute said suit, on the part of the second mortgage bondholders; but at that time we only proposed to ask the court for a Receiver. It was after the suit commenced that the pleadings were amended, and the trustee went in for sale, which I opposed, though I thought a sale of the road was necessary, as it owed more than it was worth; but I did not want a sale until an opportunity could be given to the holders of the different classes of securities to ascertain their equities, and time had been given to compromise among themselves, which could be best done after the road had been managed by a Receiver a year or so, and the capacity of the road to earn money had been demonstrated."

Mr. Vallette testified to the early efforts of the directors in behalf of the road, and also to the want of interest taken to

preserve the road by the counties and cities interested. "The only interest I ever saw the counties take in preventing a sale of the road, was on the day of trial. There came a party from Harrison County, and applied to be made parties to the suit (which the court allowed), when they made a very weak argument, showing that they did not understand the case, and were of no use in preventing the sale ordered by the court." When witness purchased his third mortgage bonds from Walker, railroad securities were depressed, and money scarce. Western railroad securities were in bad credit. "Mr. Walker frequently applied to me to indorse for the company, and offered to pay me liberally for doing so, but I refused. He applied to Bowler, and paid him liberally for indorsing for the company, as Bowler told me himself."

Being asked what was said by Judge Robinson, his attorney, in his argument on the trial, as to Bowler's course, and his intention of purchasing the road, the witness said he could not give the exact words. In reference to the "Proposition to Bondholders," the judge said "that it evidently was not made in good faith by the company, and was brought about by Bowler to degrade the bonds and enable him to buy them up for a trifle, which he had done; and was now in this court in possession of such large amounts of bonds, as in the event of the sale being decreed by the court, he would become the purchaser; thus, as a trustee, suing the interest he should protect, and asking the court to legalize a stupendous fraud."

JOHN H. CHEVER.—Of the firm of Kirk & Chever, stock-brokers, in Cincinnati, testified that his firm bought large amounts of bonds of the road for Mr. Bowler, during the years 1858, 1859, and 1860. He furnished a tabular statement from their books, which is printed on pages 179, 180, and 181 of the printed record. Disregarding small amounts, the following are the prices paid:

In October, 1858, \$3,000 3d mort. at 33½ cents on the dollar. In November, \$5,000 at 30c. In December, \$500 income, 10c. flat. In January, 1859, \$2,000 2d mort. 50c.; in March, \$4,000 3d mort. 25c. flat; \$9,280 2d mort. 45c.; \$7,000 at 45c. flat. In May, \$5,000 2d mort. at 50c. In June, \$36,000 income, at 12½c. In July, \$2,500 income, at 12½c. In August, \$4,000 3d mort. at 36c. In October, \$1,000 2d mort. at 75c., and \$1,000 at 70c., \$2,000 at 65c., several coupons at par; and \$1,000 at 60c. In November, \$1,000 2d mort. at 65c. In December,

\$10,000 preferred 10 per cent income, 35c. In January, 1860, \$9,000 2d mort. at 65c.; \$2,000 1st mort. at 75c. In February, \$5,000 income 10 per cents, at 24c.; \$1,000 2d mort. at 66c. flat; \$1,000 at 80c., and some coupons at par. In March, \$4,000 10 per cent income. 40c. flat; \$1,000 2d mort. at 80½c. In May, \$18,500 income, at 15c. In June, \$5,000 2d mort. at 70c. and interest. In July, \$3,000 2d mort. at 73c., and \$1,000 at 70½c. In July, \$2,000 1st mort. at 73c., and \$2,000 2d mort. at 70c. and interest, besides coupons during the last few months at par.

SAMUEL J. WALKER.—Treasurer of the company until the latter part of 1857, as also agent for the sale of the bonds of the company. James W. Walker is brother of witness. "I purchased the third mortgage bonds on his account." Gave mortgage security on real estate to an estimated value of \$150,000, and the bonds remained on trust, and were disposed of only as the liabilities were discharged. After this assumption, there was a balance of \$40,000 or \$50,000, on which the directors were liable, which "was afterward paid by the sale of income bonds." This balance was paid soon after the assumption. The payments under the assumption were generally made in advance of the times required by the contract; and all the amount of \$300,000 was paid (a). The company allowed witness \$15,000 on his account as Treasurer; \$26,500 on his account as bond-agent, and other matters; \$27,000 on account of purchase of the college property, with release of damages; and \$15,000 on third mortgage coupons past due. These allowances amounted to \$83,500; and were by witness's consent, except some \$15,000 to \$18,000, applied by the company to the payment of the "old bank indebtedness;" and he did not recollect any other "old bank indebtedness" for which the directors were liable, except that assumed as aforesaid. Witness had numerous and large transactions, both on behalf of the company and individually, with Mr. Bowler, in selling him bonds, and procuring indorse-

(a) The account of James W. Walker, as copied from the books of the company by E. B. Clark, and sworn to by him, showed that he was charged with the sale price of the third mortgage bonds, amounting to \$300,000, and other charges, making a total of \$340,726.23. The credit side of the account showed that it was entirely paid, mostly in taking up "bills payable," scheduled in two accounts, marked A and B, the first amounting to \$210,869.69, and the second to \$111,000. The latter amount is shown to have been bills payable of the character usually called in this suit "old bank indebtedness," and to have all been paid previous to July 16, 1858; and the last credit on the account is of \$3,899.92, on the 16th day of June, 1859—being the only one during that year.

ments by the house of Carney, Swift & Co., in which he was a partner. After Mr. Bowler became a director of the road, witness agreed to sell through him, "he acting as agent, \$50,000 third mortgages, which sale I authorized him to make at forty-five cents on the dollar, and which he professed to have made to a party in New York at forty cents on the dollar on some time." On this arrangement some \$39,000 of bonds were delivered; but the price being very low, and circumstances inducing the witness to believe that the alleged sale was really to Bowler himself, he investigated the matter, and finding such to be the fact, declined to deliver any more bonds. Witness explained, that in the argument in the foreclosure suit, his "attorney claimed, or took the ground before the court, in the contention for priority between the income and third mortgage bonds, that if the court should decide that the income bonds should take precedence of the third mortgage bonds, on account of my knowledge of the issue of the income bonds, at the time of my purchase of the third mortgages, that then, inasmuch as I had taken the third mortgages instead of or for a prior mortgage on the road, given previous to the issue of any of the income bonds, that my claim should be subrogated, or remitted back, to the original to the directors and myself." This brought about a negotiation between Mr. Bowler and witness's attorney, for the third mortgage bonds held by him (\$105,000), for which, with \$10,000 or \$12,000 income bonds, also held by witness, Mr. Bowler agreed to pay about \$54,000. While the foreclosure suit was pending, "and very shortly before the decision thereof," Mr. Bowler offered to sell to witness "some \$300,000 of the third mortgage bonds, or thereabouts, at thirty, thirty-three, or thirty-five cents on the dollar, "at which price, whatever it was, I agreed to purchase, and arranged as to time to comply with his terms, when he declined to sell." The witness appended to his deposition an estimate made by him about the time of the sale of the road, of the cost to Mr. Bowler of his investments in the road, which estimate of such cost was a total of \$483,000. It was also shown by the testimony of Mr. Walker, as well as that of JOSIAH R. DODGE, that the company owned other valuable real estate than that used in the operation of the road, at the time of the sale, of which was ten acres of the "Southgate

property." With the fee of the freight-depot grounds and "round-house" in Covington, and depots in Cynthiana, Paris, and Lexington, the real estate amounts to many thousands beyond the road-bed proper.

On cross-examination, Mr. Walker said he supposed the improvement by arching the road through the College grounds, which the company was bound to do, would have cost more than the company paid him for a release therefrom; that the income bonds sold higher before the suspension of interest in 1857, than they did afterward; and that after Bowler's becoming a director, witness did not sell him any bonds on behalf of the company.

WM. H. TAYLOR.—Assistant Assessor of the Sixth District of Kentucky, to which the road made its returns for taxation. Had access to the books of the District, and from them made an Exhibit of such returns, from which it appeared that the receipts of the road for the transportation of passengers for the year 1863 (excluding the month of January), were \$344,621.17. For the year 1864, for the transportation of passengers for six months, and for freight and passengers for six months, \$615,061. For the year 1865, for transportation of freight and passengers for eleven months, \$774,169. For the year 1866, for freight and passengers for seven months, and for passengers the remaining five months, \$474,569. For the year 1867, for passengers only, \$249,597; and for the year 1868, for passengers only, \$235,199.

GEORGE HOWK.—Testified that at the time of the sale of the road, he resided in Covington, and had an acquaintance with Mr. Bowler, of years' standing, and of such a business and personal character, that whenever they met he had something to say to witness. At that time, Mr. Howk said, he had pecuniary means to invest in such an enterprise as he referred to in this part of his deposition:

"In 1859 I was going down Madison Street, in the city of Covington, Kentucky, and on the corner of Fifth and Madison Streets Mr. Bowler hailed me. Through the course of the conversation I had with him, I told him I believed I would take stock in the company forming in Harrison County, Kentucky, for the purpose of purchasing the road. Mr. Bowler told me to have nothing to do with it; that he had just sold out all of his stock and bonds to Mr. Carneal; that he would have nothing to do with it. This was the Monday of the same week that the road was sold."

DR. GEORGE H. PERRIN.—Resides at Cynthiana, and is one of the directors of the road, and has been since December, 1859. Was one of a company formed in Harrison County, to buy the road; and on the evening before the sale, went to Lexington to attend it. Met Mr. Levis on the train, and informed him that he (witness) was going to attend the sale as one of the company. “Mr. Levis commenced depreciating the road, speaking of its very bad condition; said it would take a very large sum to put it into good running order. He spoke particularly of the Townsend bridge.” “He said it would take a very large sum of money to fill it. He said that the purchasers of the road would be very much troubled about the road from Paris to Lexington, Kentucky, as that road belonged to another company, and he did not know whether it could be bought, rented, or leased.” “He said he thought the road would bring probably \$1,500,000 or \$1,600,000. I asked him if he did not think it would bring \$1,700,000? He said, whoever would give that would give too much, and that they would be sorry for it, or words something like that.” At the meeting of the company that evening, to agree upon a bidder and fix the amount for which the company would bid, in consequence of the conversation with Mr. Levis (and which witness communicated to the meeting), he voted against bidding \$2,000,000 for the road. After the sale, “I received a letter from Mr. Bowler, in which he said he wished to get some influential men along the road to take stock in the road,” and suggested witness and Mr. Shawhan. “He said I could have as much stock in the road as I wanted, or words to that amount. I returned him no answer.”

JOSEPH SHAWHAN, SR.—Resided in Harrison County, and at the time of taking his deposition, was in the 89th year of his age. Was a director of the road, and one of a committee of the Board appointed to call on Mr. Bowler, and ascertain upon what terms he would surrender the road to the company. The committee consisted of Messrs. Shawhan, Greer, and Zinn, and called upon Mr. Bowler at his office in Cincinnati, in the Summer of 1860, and selected Mr. Shawhan to state the business of the committee. “I told him that Mr. Zinn, Mr. Greer, and myself had been appointed to see him about the road. His answer back to me was, that he would not have any thing

to say to Mr. Zinn or Mr. Greer; that any thing I had to say to him, that he would talk to me about it; that the other gentlemen could withdraw; that he would have nothing to say to them; and they did leave forthwith; that I could stay and have some talk about it. I did stay; stayed with him the better part of the day, and sounded him to know what he would take. To the best of my knowledge, he said that he would take \$500,000 for his bargain. I declined giving him that, and I did not make him any offer. When I found that that was the least he would take, I told him that I could not go into it on those terms. After I declined his offer, he made me propositions about the road; that I could take as much stock in the road as I wanted, if I wanted to join him." Witness was one of the company formed in his county to buy the road, and selected as the bidder. He bid as high as \$2,015,000, or thereabout, when all his company had backed out from any higher bid, as he supposed, from what Dr. Perrin had communicated to the company the evening before.

ABSTRACT OF DEFENDANTS' EVIDENCE.

D. C. COLLINS.—In 1857 and 1858 was book-keeper to bring up the books of the company. He verified the correctness of the Annual Reports for 1857 and 1858, the tables of which he mostly prepared himself (a). The total amount of "interest, discount, commissions, etc., paid by the company to November 1, 1857," he stated to be \$1,078,293.97; and from that time to November 1, 1858, \$111,529 more. Witness gave a table of the liabilities due and unprovided for November 1, 1858, as follows:

Coupons past due and unpaid,	\$114,140 00
Bills payable " "	29,634 47
Due individuals for materials, unpaid,	2,276 27
" " wood, " "	4,141 00
Interest and exchange on coupons (estimated),	5,000 00
Due officers and laborers, services,	13,110 67
	<hr/>
	\$168,302 41
Less cash on hand, November 1, 1858,	6,176 88
	<hr/>
Liability of the company, November 1, 1858, past due and wholly unprovided for,	\$162,125 53

(a) The Annual Report of 1853, 1855, 1857, and 1858 were offered in evidence. As to the Report for 1859, see the newspaper report commencing on page 500.

If, after that date, all interest was left unprovided for, the total coupons due on the 1st of August, 1859, would amount to \$266,230. "Due and becoming due, up to December 18, 1859," including all interest and demands of every kind, and the interest paid on the first mortgage bonds, \$465,825. On cross-examination, Mr. Collins verified Exhibits D. and G. in the Annual Report of 1858.

JOHN T. LEVIS was recalled by the defendants, November 11, 1869.—The financial condition of the road was not good when he became a director, and he soon became liable as indorser, etc. In 1854, the money market was close. There were suits against the company at different times, and the means of the company were attached, and its subscription-books taken at the suit of creditors, and put into the hands of a Receiver. The directors used every effort to extricate the road from its difficulties, but resort to individual credit was necessary. Mr. Bowler was requested by some stockholders to become a director, "hoping his influence, wealth, and large interest, might help the company out of its difficulties, and be of general use to it." "He was an attentive member to the interest of the company. So far as I knew, he devoted a good deal of time to its business, and assisted with his name and advice to protect its interest, and economize its means." He indorsed for the company, with others, to the amount of \$20,300; but on cross-examination, Mr. Levis said this was the only liability that he knew of his on behalf of the company, and that he knew of no losses of Mr. Bowler by reason of any obligations of his for the company. During Mr. Levis's connection with the road, he said there were no expenditures made thereon except what were absolutely necessary, "and often less than should have been, on account of its poverty." The property purchased from Walker was necessary for the business of the company; and at the time of taking his deposition, was used for various purposes of the road.

The witness, nor any director, so far as he knew, refused, at any time, to give information concerning the affairs of the road. The Executive Committee, consisting at the time of Gedge, Foley, and Levis, with Mr. Bowler acting with them, prepared the "\$800,000 circular." Subsequently, the witness said: "My recollection is, that I wrote the proposition to the bondholders,

and that Bowler wrote the postscript, after I submitted it to the committee."

Witness attended the sale. There was much bidding. I heard Mr. Bowler say, "he did not want to buy the road; but he must make it bring enough to protect his interest in the road, or buy it." The road did not sell for enough to pay its indebtedness; and a statement was given to witness which showed its indebtedness, after the sale, exceeded \$1,000,000, which he made an Exhibit to his deposition. Thomas D. Davis was in charge of the machine-shops at the time of the sale; and left the road in consequence of witness's complaints that he was found in a condition unfit to attend to his business. All the money received by the committee, "Levis, Casey, and Benton, Trustees, was properly applied to the payment of the debts of the company; but I can not now recollect all the details of payment."

Cross-examination.—The witness being asked if, after the sale, Mr. Bowler proceeded to make the improvements mentioned in the circular, said: "Mr. Bowler did not proceed to make all the improvements stated as wanted; but did get more cars and machinery, and proceed to put the road in better running condition." Being asked if the cars did not still receive and discharge passengers in Washington Street, in Covington, as in 1859, he said, "They do so—just as they have always done." "Improvements have been generally gradual. There were special expenditures made after the sale; more than ordinary repairs, namely: renewing bridges, putting down new rails, filling up the Townsend Valley, and an extra quantity of new ties, all of which do not come under ordinary expenses." "The company finally paid all the debts for which the directors were liable." Being asked the reason why the interest on the third mortgage bonds was paid, and the second mortgage interest not paid, the answer was: "The directors did not consider the payment on the second mortgage bonds would release the road from its difficulties, and concluded it better to pass all the interest, and use the money for the use of the running expenses of the road." Mr. Benton received a salary of \$3,000 per year as President and attorney for the road. Being asked to state what he knew as to the amounts paid by Stevenson, Ernst, and others,

for their interests in the road, when he retired, he said: "Mr. Bowler made a stock for the road amounting to \$1,100,000, subject to the mortgage debts, and offered the same to the purchasers at fifty cents on the dollar. He said to me they had offered him thirty-five cents, but how much they decided on, I never knew."

M. M. BENTON.—Is attorney for defendants in this case. Was elected director of the company at its organization in 1849, and re-elected until elected President in January, 1853, and served until December, 1856. "I acted as counsel and attorney for the road from its organization until the road was sold." "Was all the time acting for the road, and never against it. I became surety for the company in various ways;" "and am yet surety for the company on a bond to the county of Fayette, to indemnify the county against the payment of twenty lost bonds of \$1,000 each. The notes and bills upon which I was indorser was paid off just before the sale of the road." Witness, and other stockholders, solicited Bowler to become a director, which he did. At his election he was the largest individual stockholder, and held large amounts of the second and third mortgage bonds. "The estimation held by the community of Mr. Bowler was, that he was a man of wonderful energy of character and activity, of large means and great resources, and had few equals as a financier." At that time the credit of the company was very low, and supplies had to be purchased on individual credit of the directors. "The friends of the company were gratified at his [Mr. Bowler's] election, and it tended to inspire new confidence that the road might be extricated from its difficulties." The suspension of the payment of interest on its bonded debt enabled the company to pay promptly for supplies and current expenses; and in this respect the credit of the company was improved. It also enabled the company to discharge some pressing debts which were in execution, where property was attached, etc., and save the sureties. All the mortgage bonds were sold at the time Bowler became a director. Mr. Benton gave the same account of the indorsements by the directors as did Mr. Levis, and, as shown by the extracts from the minutes, for portions of which judgments were obtained and levies made on his and the property of his co-sureties. Witness was one of

the attorneys for the company in the foreclosure suit, prepared the answer, and appeared for the company on the trial. "In all my interviews with Mr. Bowler, when he was a director of the road, he manifested great anxiety to defend the suit as effectually as possible, and to defeat it, if it could be done. I thought then that he was in earnest, and his *actions* a real defense to the action, and a desire to defeat it. He was largely interested in the road, and employed Judge Gholson to assist in the defense, to prevent the sale. Also, to protect Mr. Bowler's interest as bondholder, in reference to the question of priority in the event of judgment against the company. I had conferences with Judge Gholson upon the questions arising in that case. Bowler's defense continued up to the judgment."

Mr. Benton again gave an account of the embarrassed condition of the road at the time and before the commencement of the suits—the judgments, levies, attachments, etc. During the first part of the war, and afterward, when the rebels were burning the bridges, depots, etc., "many looked upon it [the road] as destroyed, and that Mr. Bowler would be ruined by it. I don't think the road would have sold in 1861, 1862, or 1863 for as much as it did sell for in 1859; though in 1863 it began to do a large business, and did appear to do a large business for the remaining part of the war."

On cross-examination, Mr. Benton said he had attended, principally, to the taking of depositions in this case on the part of defendants. His associate counsel were M. C. Johnson and Judge Goodloe, of Lexington (the latter of whom was the judge ordering the sale of the road), Harvey Myers, and Carlisle & O'Hara. The remaining part of the debt for which witness was liable, and which was paid shortly before the sale, was about \$24,000. No suit was brought against the company on any of the bonds, the interest on which had been suspended November 12, 1857, until after the foreclosure suit, when suit was brought on the income bonds. Their suit was in the foreclosure proceedings, and "they opposed the sale." "I did insist that the paper upon which I was bound should be paid before the sale, before any suit was brought, and all the time from the period when I left the company." Being asked the question if the company could not have paid current expenses,

and interest on the first and second mortgage bonds (not taking the amount on which the suspension of 12th November, 1857, was made, into account), Mr. Benton said: "I only know its financial condition from its reports. They show it had not the means to pay the interest on the first and second mortgage bonds, besides the running expenses and repairs made, and the payment made on its floating debt." In 1859, "was of the opinion, and doubtless told Mr. Levis so, that I thought the road ought not to be sold. I was then of that opinion, and hoped to prevent it. I did not think it was necessary, and urged that an effort should be made to capitalize the floating debt, income, and third mortgage bonds; and then I hoped that the road might be saved to the stockholders." The Board left the subject of calling the stockholders together to vote on the question of a preferred stock, to the committee, and they never requested such a meeting, finding the subject required more labor and time than they could give to it.

W. A. DUDLEY.—Was the Commissioner, and made the sale of the road. There were a great many bids at the sale. The witness said he "had not been in a position to give any thing like a full examination of the property. I knew the roadway to be in bad condition, and the rolling stock to be very much depreciated in value, for want of proper repairs. Had been connected with railroads for ten years previous to the sale, and thought myself competent to form an opinion as to their value. I thought the price paid by Mr. Bowler was a full one." Being asked if he thought the company was able to continue its business, he referred to his reports, and said that at that time he thought they could not, "without great forbearance on the part of its creditors." The road with which witness was connected was the Louisville and Lexington. "When the war broke out, Mr. Bowler offered to sell me his road at the price at which he bought it; and he seemed anxious to sell it at that price, saying he would make some reduction to a good purchaser. I declined all his propositions, as, in the state of the country at that time, I thought it by no means improbable that his road might become comparatively worthless. About the time the sale was confirmed, Mr. Bowler offered to sell me his road for what he said it had cost him. My recollection is, that the amount was

\$2,450,000, as he included the securities which he had purchased (at their cost price to him) which had been deprived of any value by the sale."

On cross-examination, Mr. Dudley said that on the 6th of April, 1860, he paid, as Commissioner, to Mr. Bowler for mortgage coupons due September 1, 1858, \$13,537.55; for coupons on preferred third mortgages, due June 1, 1858, \$12,749.36; and for coupons on preferred incomes, \$48,779.77. On the 6th of October, 1860, witness paid him \$13,460.63 on second mortgage coupons, \$9,134.45 on preferred third coupons, and \$46,180.99 on income coupons. On the 5th of April, 1861, paid him a total of \$48,529.07 on similar coupons. As Commissioner, by order of the court, purchased from Bowler fourteen preferred thirds for \$9,899.60. Also, fifteen more for \$11,250; also, fourteen more for \$10,500, and paid him therefor. Also, by order of the court, loaned him \$22,000 on the 10th of July, 1862, from funds in his hands as Commissioner.

A. H. RANSOM testified to the correctness of copies of newspaper articles published in the *Cincinnati Gazette*, from August 10th to December 30, 1859, concerning the road, its management, and sale. This entire deposition was ruled out, as not being taken in time (a).

ABSTRACT OF PROCEEDINGS IN THE FORECLOSURE SUIT.

Petition filed November 29, 1858, by James Winslow, Trustee, making the Covington and Lexington Railroad Company, Vallette, Bowler, and other representatives of the first and third mortgage and income bondholders, and the Lexington and Danville Railroad Company, defendants. Default in payment of the interest due September 1, 1858, on second mortgage bonds is alleged, and judgment is asked to be put in possession of the road for the purpose of paying such interest. The "Proposition to Bondholders" is made an Exhibit, as evidence

(a) The inquiring student, or any party interested in railroad management, will find these articles in the printed Record, from page 373 to 411. The entire record, proper, contained 420 printed pages. Besides which, it was agreed, subject to all exceptions, that the printed Record-book of proceedings in the Fayette Circuit Court might be referred to for any matter introduced in evidence and contained therein, and be considered for such purposes a part of the record.

of misapplication of funds of the road to debts inferior to the bondholders. December 27, 1858, Amended Petition filed asking sale of the road, on the requisition of a majority in interest of the second mortgage bondholders. January 5, 1859, Answer of Vallette filed, joining in prayer for sale. February 10th, Answer of Company filed. Also, Answer and Cross-petition of John R. Thornton and others, income bondholders, praying for the preservation of the road and its incomes, and the protection of their equitable rights to be paid before the mortgage bondholders. February 14, 1859, Answer of Lexington and Danville Railroad Company filed, setting up that they are owners of income bonds, and judgment creditors. April 5, 1859, Amended Answer of the Lexington and Danville Railroad Company, setting up that plaintiff was entitled to sale only to pay "*unpaid interest*;" that the *profits* of the road would more than pay the interest on first and second mortgages, as about \$100,000 per year would pay such interest; and that such profits, if the road was "prudently managed, would be more than \$200,000 per year;" alleged the misapplication of the funds of the company to inferior securities; and asked that a Receiver should be appointed, to preserve the road and protect the equities of all parties. April 5, 1859, Amended Answer of Vallette filed, withdrawing his prayer for sale, and joining in the application of the Danville Railroad Company for a Receiver. August 3d, William W. Branham, for himself and other stockholders, and the city of Covington, offered Answers and Cross-petitions, setting forth their equities, to which the plaintiff objected. August 4th, the application of the city of Covington was overruled by the court, and said city excepted thereto; and it was ordered that Branham and others should be permitted to file their Answer as representatives of all the stockholders, but not as a Cross-petition. "But said Amended Petition and Answer are not to delay the trial, but the case is at once to be heard and decided." Branham and others excepted to the order of the court refusing to allow their Answer to be filed as a Cross-petition. August 13, 1859, JUDGMENT AND ORDER FOR SALE. The court, after expressing its *opinion* that the company was insolvent, *adjudged* that the first mortgage bonds, to the extent of \$400,000, was the *first* lien;

the second mortgage bonds, amounting to \$1,000,000, the *second* lien; the third mortgage bonds, "held at the commencement of the suit by H. Vallette, R. W. Keys, S. B. Keys, J. C. Butler, and by all other persons except R. B. Bowler (*a*), Augustus Robbins, S. J. Walker, and J. W. Walker," the *third* lien; the income bonds that were sold before the 16th of July, 1855, the *fourth* lien; and the remaining third mortgage bonds, the *fifth* lien, etc. And it was further adjudged, "that the equity of redemption, *in regard to the second mortgage*," should be forever barred and foreclosed, and the road, with all its franchises and property (including the leases of the connecting roads), should be sold at public auction, the purchaser to assume, as purchase-money, the payment of the mortgages and bonds of the company when the same fell due respectively, and the interest then due, or becoming due before the day of sale, in six, twelve, and eighteen months, with interest from the day of sale, to the extent of the amount of his bid (*b*). The purchaser was to give security to meet the terms of sale, by the deposit of bonds, or mortgage security on real estate in Kentucky, or Hamilton County, Ohio. The purchaser was also required to provide a sinking-fund of \$30,000 per year, and a renewal-fund of the like amount, from the latter of which might be deducted permanent improvements on the road; and be subject to the conditions mentioned in Paragraph II, of defendants' Answer. Branham and others excepted to the judgment and order of sale. August 16th, on motion of the Covington and Lexington Railroad Company, Stevens and Fearing were required to give security for costs. October 29th, W. A. Dudley, Commissioner to make sale of the road, reported that he sold the same on the 5th of October; and the sale was confirmed. Branham and others excepted thereto,

(*a*) Mr. Bowler was afterward allowed to prove that a portion of his bonds, other than those purchased by him after the bringing of the suit, "were acquired by him from innocent holders, who acquired them for a valuable consideration, and without notice of a prior issue of the income" bonds; and the amount of the preferred thirds were finally fixed at \$337,000,—he eventually proving to be the owner of all of them, except the \$133,000 owned by Vallette.

(*b*) As Gedge's bid for Bowler was \$2,125,000, it embraced the first, second, preferred third, and part of the preferred income bonds, with interest and cost to the extent of \$387,997.02, which latter amount he was required to pay as above; namely, in six, twelve, and eighteen months, with interest.

on the ground that Bowler was a director, and could not purchase for himself, and an appeal was allowed to them; and the city of Covington was allowed an appeal from the order refusing to permit her to become a party to the suit (a).

The case was elaborately argued before the Special Judge, Hon. JOHN W. MENZIES, in May and June, 1870, by Hons. HENRY STANBERY, JOHN F. FISK, Judge WARDEN, and PETER ZINN, for plaintiff, and Hon. M. C. JOHNSON, Judge GOODLOE, M. M. BENTON, and HARVEY MYERS, for defendants. Printed briefs were also submitted to the court by Messrs. Zinn, Johnson, Benton, and Myers, the shortest of the four, that of Mr. Johnson, containing fifty-four pages. On the 20th of September following, Judge MENZIES delivered a written opinion.

ABSTRACT OF THE SPECIAL JUDGE'S OPINION.

After first stating the case, the Judge proceeded to consider the questions arising under the statute of limitations. He held that the action was not for the recovery of real estate, and consequently did not fall under the provision limiting the commencement to within fifteen years after the cause of action arose, but that it was *for relief on the ground of fraud*, and was required to be commenced within five years from the discovery thereof; and in case of death, within two years thereafter, or within one year after administration on the estate. That the discovery could not have been made before the time the stockholders went into the Fayette Circuit Court, which was on the 3d of August, 1859; and Bowler dying within five years thereafter, and the suit being brought within one year after administration, it was in time: "This action is not barred by statute of limitations."

The defense, on the part of some of the defendants, of being innocent purchasers, without notice, was unavailable, as they had knowledge, or could have easily obtained it. The effect of the foreclosure suit was next considered: "Every question decided there was a decision binding upon the parties to this action."

(a) No exceptions were taken to, or appeal asked from, any of these orders or judgments of the Court by the Covington and Lexington Railroad Company. Bowler filed no answer or pleadings in the case until questions arose touching the priority of his bonds.

Of this character the court considered the decision of Judge GOODLOE, that the fact of Bowler's being a director was not an objection to his becoming a purchaser. "Parties having the right to make the objection did make it, and it was overruled, and the sale confirmed." The Fayette Circuit Court "decided" that the plaintiff was insolvent. "If the company was insolvent, the stockholders were not injured by the sale, unless the property ought to have brought enough to have paid something on the stock." "But the court in Fayette did not decide that the stockholders or the plaintiff could not, in this court, question the holding of Bowler under the sale. It was not decided that the beneficiary could not successfully claim the benefit of the purchase of his trustee upon the ground of fraud, or without asserting fraud. Upon these questions the plaintiff is not concluded by the proceedings in Fayette."

"The plaintiff might have claimed the judgment sought, upon the principle that the beneficiary has a right to the benefit of the purchase of his trustee by doing equity. The action is not based upon this right in equity. The relief is sought upon the ground of fraud, *and upon no other ground.*" As Bowler offered to surrender the road on December 22, 1859, upon terms considered by the court "*not unreasonable,*" his holding could not be considered unfriendly until that time; and from thence "he was permitted for more than four years to treat the property as his own."

Bowler was a trustee, and was bound to the "utmost good faith" to the stockholders. "He was bound to make every exertion to preserve for them this valuable property." "He was bound to pay the debts of the company, and save the road for the stockholders, if possible, with the means and power given and conferred upon him by them and the charter. When he became the purchaser of the road, his beneficiary—the plaintiff or the stockholders—had the right to claim the benefit of his purchase by doing equity to him." Bowler was aware of this, and governed himself accordingly. The calling of Shawhan, Greer, and Zinn upon him in the Summer of 1860, implied an admission that he might dictate terms; and his reply showed that he then considered himself in a position to sell, and not to surrender the road to the stockholders. "Why was not Bowler

then attached in a court of equity?" He was allowed for three or four years more to retain the position he had taken toward Shawhan. In the mean time civil war existed, but, with little interruption, the Kenton Circuit Court was open. "The plaintiff did not wish to get back the road upon principles which equity would have enforced, for a long time after Shawhan's interview with Bowler. It was a long time before its managers became satisfied that Bowler's purchase was a speculation. Meanwhile, the plaintiff lost its right to elect to claim Bowler's purchase, and the sale of the Fayette Court has been confirmed by the plaintiff and the stockholders, unless such fraud has been shown as entitles the plaintiff to relief in an action founded upon fraud, and brought within the time allowed by law."

The court then proceeded to examine the question of fraud, and the testimony bearing thereon. The embarrassed condition of the road was considered, and the court held that the Fayette Court had decided that it was insolvent, and that that finding was binding on the Kenton Court. Although Bowler went into the road to protect his individual interests, the court thought it did not follow that he would not do the same for other stockholders. "The management of affairs was in a great measure yielded to Bowler." The court considered the action of the stockholders, at their annual meeting in 1858, as "approving" the suspension of interest, and the issuing of the "\$800,000 circular;" and attached no importance to the fact that the commencement of the suit was not communicated to the stockholders. "There was not one hundred cents to the dollar in this failure to give information, unless the directors knew that the stockholders had the information, and this is not shown in the record." At that time, the court say, the company was not able "to pay the interest on its bonds past due and falling due, current expenses and floating debts, and for necessary repairs, improvements, and additions. But it might have paid the interest on the first and second mortgages without stopping the business of the road. All other creditors would have acquiesced in the \$800,000 circular." The stockholders were to blame in re-electing Bowler with the old Board, if the "circular" looked to the sale of the road; and by reason of this action, the plaintiff was not entitled to relief. They were to blame, also, in the position

they took in the Fayette Court in seeking to get rid of the payment of interest on the bonds, and were now seeking to make the stock valuable "by gaining the place of the purchaser, because, as it is alleged, he brought about the sale; and they show, or it is shown by the plaintiff, that all of Bowler's conduct down to August, 1859, was approved by the stockholders." The court held the plaintiff estopped by the action of the stockholders, and as bound by their course in the Fayette Court.

"Bowler took steps to prepare himself to become the purchaser, or to make the road bring a good price, after he made up his mind in that direction." "He certainly contemplated the purchase before the judgment of sale, and possibly not until after Winslow's action had begun. But after he did make up his mind, he was industrious to prepare himself." But in taking these measures, in the opinion of the court, there was nothing of which the plaintiff had a right to complain. In this he was aided by the President and some of his co-directors. Bowler "does not appear to be to blame for the loss of the sum of \$46,000, which went into the hands of some of the directors, after June, 1859, and was set down to 'profit and loss.' It is not clear that this money was not used for the benefit of the company, but it is not shown that it got out of the hands of these directors for any specific use." "Bowler was opposed to the appointment of a Receiver."

The conclusion of the court is thus stated: "The plaintiff has failed to establish the fraud alleged against Bowler. His co-directors participated in all that he did, and the stockholders sanctioned all that was done by him before the judgment in Fayette, but complained of his omission and that of his co-directors, to plead against the validity of the bonds. Wherefore," it was adjudged that the plaintiff's petition should be dismissed, and that the defendants should recover their costs.

IN THE COURT OF APPEALS.

The Appeal came up for trial, at the Summer term, 1871, and was set specially for the 14th of November, Chief Justice WM. S. PRYOR, and Judges B. J. PETERS, WILLIAM LINDSAY, and M. R. HARDIN, on the bench. In consideration of the

importance and magnitude of the case, the Court extended the time for argument to nine hours for each side. It lasted for three days, two counsel being heard each day, in this order: HARVEY MYERS, opened for the appellees, and was followed by JOHN F. FISK, for appellant. On the second day, M. M. BENTON, for the appellees, and STANLEY MATTHEWS, for the appellant; and on the third day, M. C. JOHNSON, for appellees, and HENRY STANBURY, for appellant, closed. These arguments were reported by BEN. PITTMAN, the stenographer, printed, and furnished to the Court, each one containing about one hundred pages. Printed briefs were also submitted to the Court by Messrs. ZINN, WARDEN, W. P. D. BUSH, and CRADDOCK & TRABUE, for appellant, and by Judge GEO. B. M'KEE, for appellees.

To attempt to give even an abstract of the more than six hundred pages of printed arguments and briefs laid before the Court of Appeals in this case, and to apportion the different points between the counsel presenting them, is impossible. It is, therefore, merely attempted to give the leading points presented on both sides of the case, together with brief parts of the arguments made to sustain them. By the practice in Kentucky, the appellees had the opening, and for that reason that order is followed.

ABSTRACT OF ARGUMENT FOR APPELLEES.

I.—THAT THE CORPORATION WAS DISSOLVED BY THE SALE OF ALL ITS PROPERTY, EFFECTS, AND FRANCHISES.

These premises being true, the suit could not be sustained. It was claimed, that all its property and franchises were mortgaged and sold, and that this transfer and sale "is a surrender of the privilege of being a corporation." These authorities were cited: Angell & Ames on Corporations, sec. 772; *Harrison v. Lexington & Ohio R. R. Co.*, 9 B. Mon. 472; *Dudley v. Price*, 10 B. Mon. 84; *Gower v. Davis & Smith*, 2 Duvall, 17. The judgment of sale was referred to as working a forfeiture and extinguishing the right of being a corporation, within the points decided in these cases.

II.—THAT THE FAYETTE, AND NOT THE KENTON CIRCUIT COURT, HAS JURISDICTION OF THIS ACTION.

1. It was claimed that all matters that were litigated in the foreclosure suit—matters of defense thereto, and all others connected therewith, and that could have been presented in that case—were therein passed upon, fully adjudicated, and excluded the Kenton Circuit Court therefrom. These cases were cited: *Talbott v. Todd*, 5 Dana, 193; *Rochester v. Anderson*, 3 Bibb, 399; *Hayden v. Booth*, 2 Marshall, 354; *Carlisle v. Long*, 3 Marshall, 435; *Allen's Heirs v. Hall*, 1 Marshall, 526.

2. That a bill of review, or to impeach a decree for *fraud*, must be prosecuted in the same court that decided the original action, citing *Singleton v. Singleton*, 8 B. Mon. 343; *Hanna v. Spott's Heirs*, 5 B. Mon. 365; Story's Eq. Pl. secs. 426 to 428.

3. Mr. JOHNSON claimed, that "under the second mortgage, the legal right to a sale of the railroad and its equipment *was perfect*, upon a default for sixty days after demand, in the payment of the interest due 1st September, 1858;" and that no subsequent payment would impair this legal right. That no default in Bowler for the non-payment of that interest was charged by the plaintiff; "and in addition, it was sanctioned and approved by the stockholders in December, 1858."

4. Mr. Johnson repeated some of the reasons given by Judge GOODLOE for ordering a sale; that the interests of the public would suffer by allowing an irresponsible and insolvent corporation (as he considered the plaintiff at that time to be) to remain in custody of the road, and therefore ordered a sale, reserving the power to control the same, as shown by that clause of the order of sale quoted in Paragraph III, of the answer. As a consequence of this reservation of control, counsel claimed that the road remained in the custody of the Fayette Circuit Court, and that it still so remains; that Bowler first, and now the appellees, are running it under its supervision, and as its agents; therefore, the present suit is an attempt to interfere with its vested jurisdiction, and, indeed, is in contempt of the Fayette Circuit Court. Mr. Johnson said: "It is a well-settled principle of equitable jurisprudence and practice, that when a court of equity has obtained jurisdiction of a trust, it will retain the jurisdiction of the complete administration of that trust, and

this jurisdiction becomes exclusive of all co-ordinate courts." And Mr. BENTON said: "An injunction would have been awarded against appellant, if asked, to quiet the possession and to restrain appellees from further action;" and "the only solution of this problem is for the appellant to begin in Fayette."

III.—THAT THE CAUSES OF ACTION IN THIS SUIT WERE INVOLVED IN THE FORECLOSURE SUIT, AND ARE BARRED BY CONCLUSIVE DECISIONS IN THAT CASE.

1. Under the Code of Practice, "all defenses, both legal and equitable, must be presented in the one civil action, and consequently, all defenses, legal and equitable, are concluded by the judgment, whether presented or not."

This was Mr. Johnson's position, and to sustain it, he cited *Hawkins v. Lambert*, 18 B. Mon. 106, and *Garver's Adm'r v. Strode*, 5 Littell, 314. It remained to be considered whether the equitable matters in this suit were so set up in the foreclosure suit as to preclude their examination in the Kenton Circuit Court.

Mr. Johnson said: "If the appellants have, as they claim in this suit, an equitable right to the property, they had it at the time of the confirmation of the sale, and should have asserted it at the confirmation, as the effect of the confirmation was to pass to Bowler a right to all title, legal and equitable then in the appellant; and the appellant is estopped and concluded from asserting any claim, legal or equitable, to the property, the sale of which was confirmed by the final judgment of the court, until that confirmation had been reversed, annulled, or modified by due process of law." "The appellants, by exceptions to the confirmation, recognized, in express terms, that the sale, when confirmed, would pass to Bowler all the rights of the parties to the property purchased in his individual right, and that fact formed the ground of one of the exceptions." "All the rights and equities of every one interested in the property and franchises sold, were before the court, and all equally demanding its equitable protection. Its sale, by the operation of law, cuts off all rights, interests, and equities of whatever kind or description, and however arising, of all the parties to the action, and vested all those titles, interests, and equities in the

purchaser. It was, therefore, the right of each and every party, upon the question of confirming the sale, to present to the court, for its protection, all those rights, interests, and equities injuriously and wrongfully affected by the judicial sale, and to exhibit, by exceptions and proof, all the facts in their knowledge which would show the wrong that would be committed by passing those rights and interests, legal or equitable, to the purchaser. If the court will not protect them, there is the remedy by appeal. If the evidence to show the wrong is not discovered until too late for exception, there is the remedy of a new trial to be had in three years after the final order, according to sections 399, 371, 373, of the Civil Code."

The plaintiff being a party to that suit, and Branham, Desha, and other stockholders, who were admitted as defendants, excepting to the confirmation of the sale to Bowler as an individual purchaser, Mr. Johnson claims that it "concludes the following propositions: 1. That Bowler's directorship did not preclude him from purchasing in his individual right, at a judicial sale, conducted wholly by the court through its commissioner. 2. That there was no dereliction of fiducial duty as a director in the matter of the sale. 3. That the sale was a fair sale, conducted according to the judgment of sale, and for a fair price. 4. That Bowler, by the confirmation of the sale, had the right, on complying with the terms of sale, to the absolute legal and equitable title to the property purchased, unincumbered with any title, legal or equitable, of any of the parties to the action;" and "the appellant being estopped and concluded on these propositions, is barred from maintaining his present suit."

2. It was also claimed that the court passed upon the question of the solvency of the road, and subsequently upon the validity of Bowler's bonds; and therefore, the appellant is also estopped upon them, as matters of complaint.

Upon the latter point, Mr. Johnson claimed: "The court paid them, as good and valid, claims and liens upon the property sold and the proceeds of the sale. It is now sought to set aside this direct action of the Fayette Circuit Court, upon a subject undeniably within its jurisdiction, and a subject on which, by the nature of the proceeding, it was bound to act, by this suit in the Kenton Circuit Court. It is true that no defense was

made against these bonds held by Bowler, either by the company or the stockholders; they permitted judgment and satisfaction to take place by default. Each and every bond held by Bowler could have been contested upon all legal and equitable defenses; and by the well-settled principles of law and equity, all defenses then existing were as much concluded by the judgment by default as they would have been by an adverse decision, had those defenses been actually put in issue and litigated. It is true that a re-trial could have been obtained, if the proper grounds of discovery of new evidence, or new matter, could have been shown; but the re-trial could only have been in the Fayette Circuit Court, and within three years after the final orders.

“The order of the Fayette Circuit Court, by which the bonds held by Bowler were allowed and paid, all were made after the new Board of Directors came into office in December, 1859, and, consequently after the suit, so far as the plaintiff was concerned, was under the control of the new Board. There is, therefore, no excuse for not objecting to the allowance and payment of those bonds, on account of the undue influence of Bowler in the Board of Directors. If the invalidity of these claims was not discovered until after the decision of the Fayette Circuit Court sustaining them in full, there was a remedy by new trial in that court for three years after the decisions were rendered. Sections 369-373 of Code.”

IV.—LIMITATION BY TIME AND BY OPERATION OF THE STATUTE.

Under this head, the counsel considered all points of defense involving lapse of time, including alleged *ACQUIESCENCE* in, and *ELECTION* to abide by, Bowler's purchase of the road.

1. Mr. Johnson first considered the subject of *Election* or *Acquiescence*; and, in connection therewith, what amount appellant would have had to pay him had they avoided the sale immediately thereafter. Inasmuch as he held \$611,000 of third mortgage and income bonds which stood in priority next to the amount covered by the bid, Bowler “would have continued bidding up to at least \$2,500,000, and at that price would not have been compelled to pay more to others than he paid on the bid at which he purchased. The road, therefore, *actually cost* him at

least \$2,500,000, partly in securities of the company and partly in cash. This was the amount which would have been necessary for plaintiff to have paid him upon an avoidance made immediately after the sale.

"Law and equity," Mr. Johnson claimed, fixed the time within which this election to avoid must be exercised, to be "as soon as it can *reasonably* be done." He cited *Arnett v. Cloudas*, 4 Dana, 300; *Willott v. Forman*, 3 J. J. Marsh. 293; *Hoggins v. Becraft*, 1 Dana, 30; *Lightburne v. Cooper*, 1 Dana, 273; *Tiffany & Bullard on Trusts*, 148.

Mr. Johnson then considered the controversies in the newspapers concerning Mr. Bowler's relations and dealings with the road, and claimed that they were notice to the stockholders and to the plaintiff, and who were presumed to have taken notice, and to have had knowledge thereof. We had therein been charged with the design of bringing the road to sale, and of becoming the purchaser. "Bowler, denying the charges, says to the stockholders, 'Take the road at my purchase.'" "He says to the stockholders and company: 'Take all my purchases at the price I paid for them, and six per cent interest. You shall have the whole benefit of all the sharp trading in these securities with which I am charged.'" Mr. Johnson proceeded to show the reasonableness of this proposition; and entering into details, showed the road would have cost the stockholders \$2,736,820 under this proposition. The only question was, whether sufficient time was given for its acceptance; and on this point Mr. Johnson said: "It was a matter on which Mr. Bowler had *the right* to require, on the part of those interested, and who laid claim on him as their agent and trustee, *prompt, decisive, and energetic action*. Justice, equity, and law sustain him in this clause. He, unaided and alone, was required to exert still greater promptness, decision, and energy. He was compelled to manage and run the railroad, and superintend all its workings, and make provision for all its necessities. He had to raise, by his individual resources and credit, of principal and interest, \$411,800, in six, twelve, and eighteen months, to pay the cash portion of the purchase, besides paying the semi-annual interest on \$1,737,000 of bonds, and \$60,000 annually for the sinking and renewal fund required by the judgment, after

having weakened his ability and diminished his resources by the deposit of \$200,000 in good securities as collateral security for the prompt payment of the bonded mortgage debt. The rotten and unsafe condition of the bridges and Townsend trestle-work imperatively demanded a heavy outlay in rebuilding them for the safety of the lives and property of the public. It is, therefore, not to be wondered at, that Bowler should shrink from the magnitude of the task before him, and the weight of the burden upon his single shoulders."

As evidence of Mr. Bowler's willingness to surrender the road, Mr. Johnson claimed, that, after "three years of trial and difficulty, he sold to the joint stock company now owning it, the whole purchase at \$2,000,000, bonds and cash, being \$125,000 less than he paid for it, and \$400,000 less than he offered it back to the stockholders of the company." As to the offer to surrender, Mr. Johnson cited *Roach v. Hudson*, reproduced in this work, page 418.

In regard to the proposition to surrender, Mr. Benton said they "did not accept the proposition, thereby electing not to take the road, but that Mr. Bowler should make the improvements and keep the property. They knew that the repairs must be immediately made, else the road could not be safely operated. They knew the terms upon which the road had been sold, and with which Bowler had to and did comply; and that it required considerable sums of money to meet the cash payments under the sale, and heavy security to be furnished; so, altogether, the burthen was too heavy and the risk too great to incur for the property; hence, after all that had been said and written about the bad conduct of the directory, and especially of Mr. Bowler, and about the sacrifice of 'the valuable property,' they concluded again, as they had done at and previous to the sale, that the property was not worth the sum for which it had been sold, and that they would not take it, but would and did give it up."

2. *The Statute of Limitations*, Mr. Myers claimed, barred the suit. It was a suit for *relief on the ground of fraud*, and barred in five years, sec. 2, art. 3, ch. 63, 2 Stanton's Rev. Statutes of Kentucky, 127. That this action was not to recover real estate was sufficiently answered by reference to the charter of the

"company, which makes its capital stock, that is, its entire property, *personal estate*," sec. 2 of original charter, Acts of 1847, page 41.

Mr. Myers claimed, that previous to the adoption of the Revised Statutes of 1852, there was no provision of the Statute of Limitations applying to injuries resulting from fraud; but since that time, all actions of that character are limited by that provision. He said: "This will be plain when it is considered that in every action for relief on the ground of fraud, the party must recover either *realty, personally, or money*. Now, as there are specific provisions in the statute (independent of that relating to fraud) prescribing the time within which all actions to recover real estate, personal property, or money, must be commenced, this provision fixing the time within which actions for relief on the ground of fraud must be commenced, *could never be relied on in any case*, were the construction contended for on the other side correct, inasmuch as it would always be said that the object of the action was to recover either property or money, and therefore the provisions of the statute which limit actions for the recovery of property or money, must apply, and not the provision limiting actions for fraud. This would virtually repeal the clause limiting actions for fraud, and leave the statutes precisely as they would stand without it." As sustaining this construction, Mr. Myers cited *Sears v. Shafer*, 2 Selden, 268; *Salve v. Ewing*, 1 Duval, 271; *Hieronumus v. Mayhall*, 1 Bush, 508; *Dye v. Holland*, 4 Bush, 635.

As to the alleged delay in discovering the frauds, Mr. Myers claimed that the time commenced running from the commission of each alleged act of fraud. "The only one entitled to any consideration is the charge that the directors *refused to pay the interest when they were able to do so*, and thereby induced the suit for foreclosure." The suspensions on the payment of interest in 1857 and 1858 were known to them when they took place, and therefore they could claim no delay on that account. "But if any thing was unknown, they were advised of enough to put them upon inquiry. They were advised of the suspension of interest, and of the statements in the circular. These were acts done by their agents in their presence. They were acts of a great and serious character, going to the vital interests of the

corporation, and of each individual stockholder. They had no right to sleep and dream away seven mortal years before concluding to look into matters and see whether they were true or not." Angell on Limitations, sec. 187; *Farnham v. Brooks*, 9 Pick. 212; *Bishop v. Little*, 3 Greenleaf, 405; *Champion v. Rigby*, 1 Russ. & Myl. 539, were cited as authorities on these points.

Mr. Johnson urged that the suit was barred in three years, under sec. 373 of the Code; and that the remedy was in the Fayette Circuit Court.

As to the additional time allowed by the death of the party within the limit fixed by the statute, it was claimed that Bowler having conveyed the road to Ernst and Keith in trust, the statute did not stop running. Mr. Myers claimed that "there never has been, at any time since Mr. Bowler took possession of the road, the lack of proper and sufficient parties against whom *an action for the recovery of the road* could have been brought." And Mr. Johnson claimed, that if "the appellant succeed in this suit in recovering the equitable title to the property purchased by Bowler, the recovery will not be of Bowler, but of Ernst and Keith, and they, not Bowler, will be adjudged to be trustees for appellant, and holding for their benefit." In case of recovery, an account would have to be stated of the earnings of the road previous and after the conveyance to the trustees, but they "are the parties in behalf of and against whom the account would have to be stated." "The frauds charged against Bowler could be proven against Ernst and Keith, his trustees, as well as against his personal representatives and heirs. Ernst and Keith are his legal representatives and privies in estate as to the specific property, the recovery of an equitable interest in which is the object of this suit. No doubt Bowler's representatives, as well as the other stockholders, are proper parties to this action. Being interested as *cestuis que trust*, they may be made defendants, secs. 33, 34, 35, of the Code. But it does not follow that they *must* be defendants." *Mead v. Mitchell*, 5 Abb. 106; *Hopkirk v. Page*, 2 Brockenbrough, 20; Story's Eq. Pl. sec. 216, were cited.

V.—DEFENSE ON THE MERITS.

Mr. Johnson opened his argument under this heading with a claim that the Fayette Circuit Court had *decided* that the com-

pany was insolvent, and that that decision was conclusive and binding on the appellant. He, nevertheless, proceeded to sustain this position by statistics, and otherwise to prove that

1. *The Company was insolvent when the Road was sold.*—He stated that the road, with the equipment and real estate, up to the 5th of October, 1859, cost \$4,167,447.19. From this he deducted discount on all the bonds of the company, and interest on bonds and floating debt above the earnings, \$1,078,293.22, leaving the “cash cost of the road, \$3,089,153.22.” Against this, there were mortgage and income bonds, judgments, and interest, to the amount of \$3,233,532.64; making an “excess of debt over cost, \$210,864.78.” With this result, Mr. Johnson concluded that “as the debts of the company exceed its cost by at least \$144,179.42, and the company has nothing of value but the road, it follows, not as a probability but as a mathematical truth, that not only all its capital stock has been sunk and lost in discounts, interests, and other expenditures, and losses above its earnings, but that it would require the payment of \$144,179.42 by the stockholders, to make the stock cover the losses, and bring the assets, at their true cost, to a balance or equality with the liabilities.” “The stockholders lost nothing by the sale. The dead can not be killed.”

Mr. Johnson then considered the value of the road with reference to its profitableness. For this purpose, he stated the debt of the company at \$3,300,000, which, at seven per cent interest, would be \$231,000, which, with the amount required for permanent improvements, would increase the amount necessary to be expended on the road annually, to \$261,000, “for which there could only be reasonably calculated \$225,000 of net earnings, leaving an annual deficiency of \$36,000, which would accumulate, or, what is far worse, the road and equipments would be allowed to go to decay, and worn out.”

Mr. Johnson, therefore, concluded with Henry Vallette, that the company, at the time of the suspension on the payment of interest, was “irretrievably bankrupt.” “This opinion was wide-spread in the community, and shared by the holders of all the bonds and securities of the company. It was shown by the price of income bonds, which were secured by lien on all the property of the company, and to be worth par, only required the

property to be worth \$2,525,000, in addition to the arrears of interest on the second mortgage bonds."

2. *Denial of Fraud.*—Mr. Johnson proceeded to examine critically the charges brought against Mr. Bowler of fraudulently bringing the road to sale, and first considered the "Proposition to Bondholders," and the suspension of interest on the second mortgage bonds, together. "The charge is not merely false; it is ridiculously absurd. The directory, leaving Bowler out of view, was composed of gentlemen of high intelligence, whose honor, integrity, and devotion to the best interests of the company, and knowledge of its condition, was unquestionable. If that proposition was a gross exaggeration of the defects of the road, so plain and palpable as to amount to fraud, would they have given it their unanimous approval?" "The representatives of Bowler might here leave this charge crushed by the two overwhelming facts of its unanimous adoption by the President and directors, and unanimous indorsement of the stockholders. The appellees go further, and assert that the statements of the '*proposition*' are *true*, and the estimates of the sum necessary for the purposes stated in the '*proposition*' is low, and that what was proposed to be done was the only means by which the company could retrieve its bankruptcy and regain a sound credit. Mr. Levis so testified. It was proposed to pay the debt on which the directors were personally bound, to complete the road, and put the road and equipments in the condition of a first-class road. To do this, required the laying of the track from Paris to Lexington, the thorough ballasting and repair of every part of the road, the building of capacious depots for freight and passengers at Covington and Lexington, and smaller ones at Paris, Cynthiana, and Falmouth, and station-houses at ten or twelve stopping-stations, water-stations, wood-sheds, etc., and a large increase of the rolling stock, including four new locomotives, and a great number of cars for passengers and freight." And Mr. Johnson furnished this "*Estimate of cost*:"

"To complete travel from Paris to Lexington,	\$200,000
Clements's estimate of cost for enabling road to get along for three years, and not for first-class road,	206,715
Additional ballasting above Clements's report,	40,000
Additional locomotives and cars,	50,000
Additional new iron and rolling of old iron,	50,000
Depots at Covington and Lexington, \$50,000,	100,000

Depots at Paris, Cynthiana, and Falmouth,	\$30,000
Passenger and freight station-houses,	20,000
Debt on which directors and officers were personally bound, and debts to employees for services, estimated at \$100,000, but turning out	171,000
	<hr/> \$867,715"

This did not include the right of way through the Baptist College grounds, which the directors were able to settle, "and get some valuable land in Covington, for \$27,000. This claim was superior to all the mortgages, being a first lien for purchase-money, and would be enforced at any moment by an injunction against its use by the road until settled." The reason of the discrepancy between this estimate and that of Clements, was because the latter was for only *three* years, whereas the other was for *five* years.

Mr. Benton maintained the same line of argument; and the letter of Mr. Bowler to T. D. Carneal was quoted to show the former's sincerity in favoring the "Proposition." "It may be certainly said, that to Bowler there appeared no other resource or plan by which the company could be saved."

The failure to pay interest.—"In regard to the failure to pay the interest on the second mortgage bonds, due 1st September, 1858, and 1st March, 1859, it would be sufficient to say, that the failure to pay was in pursuance of the announced intention in the Proposition to Bondholders, which has just been discussed, and which, together with the actual suspension, was fully approved by the stockholders in their annual meeting in January, 1858. But, in addition, the company had no funds with which to make those payments."

3. *Depreciating the value of the Company's property and securities.*—This was denied. "On the contrary," it was said by Mr. Johnson, "it is asserted that there was no one, whether director, bondholder, or stockholder, who had a higher appreciation of the value of the railroad property and its securities, or who more zealously and publicly announced, advocated, and endeavored to impress upon others that high appreciation, than R. B. Bowler." In proof of this, the "Proposition to Bondholders" and his Carneal letter were referred to as conclusive evidence. Also, his proposition to the stockholders to tax themselves to raise the necessary amount to save the property. "His

‘light was not hid under a bushel,’ but placed upon the hill-tops.” “It is, however, true that Bowler, like every one else with two ideas in his head, was impressed with the danger of the road being sacrificed, and the value of the inferior securities being destroyed by a forced sale under the foreclosure suit in the Fayette Circuit Court. In the Spring of 1859, Bowler learned, from the promptness with which process had been fully executed, answers enforced, and the necessary proof taken by the plaintiff, and the general energy with which the suit was prosecuted by the plaintiff’s lawyers, and the well-known dispatch with which the judge of that court finished the business on the equity side of the court, that the expectations he expressed in his letter to Carneal, of a protracted chancery suit, were not well-founded. If a sale should be ordered, it was the general belief that the terms for the whole amount would be cash, or credits of six, twelve, and eighteen months. Indeed, by the provisions of section 405 of Code of Practice, longer credits could not be given, except by the consent of the plaintiff, which consent was actually given afterward, at the trial.

“It was late in the Spring, and in the Summer and Fall of 1859, that Bowler commenced largely purchasing the inferior securities of the company. In his tradings with those sharpers, the Third-street brokers of Cincinnati, there is evidence that he used the danger of this judicial sale as proof that the price he was willing to give was their full value. No doubt those keen Third-street brokers did not fail to avail themselves of Bowler’s well-known and published high appreciation of the value of the bonds, and also of his estimate of the securities by his willingness to purchase. There was not the slightest difference between the two opinions. Bowler was acting upon both in purchasing. He was, by purchasing these inferior securities, enabling himself to prevent a sacrifice of the road, and of the large amount of securities he already held, while his high opinion of its value gave him nerve to bid, even should the property fall upon his hands. With his characteristic boldness and energy, he was guarding himself against threatening dangers, by bravely meeting and fighting them, while the Third-street brokers shunned the danger, by turning their backs, retreating, and abandoning the field, by selling out.

"When the uncertainties of the law resulted in Bowler's success, and, by the decision of the court and result of the sale, the securities sold to Bowler became doubled in value, there seems to have been generated in their feelings that intense hate which the narrow-minded sharper always entertains toward those who, however fairly, get the better of him in a trade. These people safely vent their spite, in these depositions, on this dead man's name. Their testimony, given ten years after the transactions, being in relation to statements and conversations, in addition to its legally recognized unreliability, is further weakened by the perversions which spite and hate never fail to produce." Bowler's efforts to reduce the price of Butler's bonds being after the judgment, "it could have no effect."

4. *"Failure to defend the suit with vigor, and especially the failure to tender into court the interest in arrear on the second mortgage, which the net income enabled the directors to have done, but paid on a debt of the company for which the directors were security."*—Mr. Johnson said: "The deposition of M. M. Benton, the lawyer of the company, proves that the directors defended the suit with full vigor. No defense could be made to the legal right of sale, which was undeniably perfect under the deed of trust." "The directors offered to pay into court, monthly, all the net earnings of the road until the interest in arrear was paid, and stated their confident belief that those earnings would enable the directors to pay the interest on the second mortgage, punctually." The court refused to appoint a Receiver. "The only thing charged, is the failure to tender into court, about the time of the trial, \$70,000, to pay the interest in arrear on second mortgage bonds. If there had been a reasonable prospect of such a tender defeating the suit, or producing any valuable delay, it would have probably been raised and paid." And it was urged, that if they had paid the interest, then the directors would have had to pay the debt for which they were security.

5. *Matters indicating Bowler's design to purchase the Road.*—This purchase of large amounts of the inferior securities was justified on the ground of Bowler's interest in the road, and his right to anticipate its sale. To a Receiver, Bowler "was utterly opposed. He knew full well the careless, slipshod, wasteful and expensive manner in which all property placed in the

hands of a chancery Receiver is managed, and that such management of a railroad is ultimate ruin. He knew that it required all the stimulus of strong, individual interest in the management of a railroad, to produce that constant watchfulness, energy, and economy necessary to its success." "In danger, he was not the man to stand still and be crushed. He energetically prepared to guard these endangered interests, and to that end purchased largely of the same kind of securities he already largely held."

This high appreciation of the value of the road, however, induced him to outbid all other competitors, and to become the purchaser. But he did not desire to become the purchaser of the road. "How little he desired the position of sole owner and manager of the railroad is shown, and conclusively shown: first, by his offer to the company and stockholders; and, secondly, by his abortive efforts to form a joint stock company with Levis, Gedge, and others." And it eventually proved a great loss to him. Mr. Benton, on this point, said: "It seems that the purchase of the road was not so great a speculation, after all; that on the 1st of January, 1863, more than three years after the sale, and after the payment of all the sale bonds and interest on the bonded debt of \$1,737,000, up to that period; and after providing the \$30,000 per annum as a sinking fund to meet the bonds at maturity; and after expending hundreds of thousands of dollars in finishing and repairing the road, supplying rolling stock, paying for right of way, and providing station, side-track, and depot accommodations, Mr. Bowler sold the road to a joint-stock company for \$2,000,000, being \$125,000 less than cost, and guaranteed the title."

6. *Bowler's right to purchase the property and securities of the Company while he was director*—Mr. Johnson admitted that Bowler stood in the relation of a fiduciary to the company. "He was not strictly a trustee." "Most strictly, he was an agent, being clothed, by his office, with authority, within the charter of the company, to manage its property and bind it by contracts. An agent is a fiduciary. The general rule, sustained by abundant authority, prohibits any fiduciary from purchasing property within the range of his fiducial duties. The numerous authorities referred to by appellant sustain this position, and it applies

to all fiduciaries, whether trustees, guardians, agents, or attorneys." "It is, however, perfectly recognized, that there are cases in which the very object of the rule, the obtaining of the highest price, would be promoted by permitting the fiduciary to bid. This occurs whenever the fiduciary has a strong individual interest in the highest possible price being obtained. In such cases, he is permitted to bid to prevent the property being sacrificed, and to obtain the highest price." There are two modes by which the fiduciary can obtain this right to bid: "1. The consent of the beneficiaries, who must be competent to consent; that is, not infants or married women, imbeciles, or others in like condition. 2. The permission of a court of equity, which is granted as a matter of course, where the fiduciary's bidding would promote the great object of the rule, the obtaining the highest price. See *White & Tudor's Leading Cases*, 167, and the case of *Davoue v. Fanning*, 2 Johns. Ch. 252, 261, 262; *Dobson v. Racey*, 3 Saund. 61; *Breckenridge v. Holland*, 2 Blatch. 377, 381." Courts of equity will protect *real rights*; but where there is nothing remaining but the shell, they will not, *White & Tudor's Leading Cases*, 151; *Parke v. White*, 11 Vesey, 209, 226.

Applying these principles to the present case, counsel claimed that after the judgment of foreclosure and sale, Bowler occupied no *real* or substantial relation of trustee toward the appellant, because it was a mere corporation by name. "That decision, with the judgment of sale based upon it, reduced the interest of the stockholders and the company *quod* that suit, and all subsequent proceedings in it, to a mere legal nominal shell," and the creditors alone had a real, substantial interest in the property and its proceeds, over which Bowler, as a director, had no control or care. "I have already shown that the insolvency of this corporation, with the sale of its property and franchises, unlike the insolvency of an individual, extinguishes its real and substantial life, leaving it only vitality to wind up its small remaining business and assets, outside of the mortgages, and then to be buried into the irrevocable past." From the day of that judgment, the equity of redemption was "*forever barred and foreclosed*;" and the court assumed the control of the property, and there was not even a "legal shell" remaining in the company.

No formal permission to bid was given in this case, "because it was considered by the court that it was unnecessary to have granted a previous special permission to bid." That question came up on the exceptions of the stockholders, and was decided; and not being reversed, it was binding, and estopped appellant. "Equity disregards mere forms. The subsequent sanction of the purchase by a court of equity is fully equivalent to a previous permission to bid. By not obtaining the previous permission of the court of equity to bid, and only applying for confirmation after the bid, the trustee is compelled to show a perfectly clear case, that his bidding did contribute to obtaining a higher price for the property than would have been obtained without it, and that his individual interest and conduct favored the obtaining the highest possible price for the property, rather than the obtaining the property at the lowest price." "What evidence was produced upon the hearing of the exceptions and confirmation, does not appear." But these matters being made satisfactory to the court, as already claimed, Bowler stood and occupied the position of an accepted bidder, and the question was concluded.

VI.—ERNST, KEITH, AND ASSOCIATES, BEING INNOCENT PURCHASERS, WERE ENTITLED TO PROTECTION AS SUCH.

"In addition to all these defenses which they have in common with Bowler, they have the defense of having purchased, without notice, of the plaintiff's present claim;" and this defense is too well established to need authorities to illustrate it. They did not purchase until after the three years allowed by the Code for appeal had passed. "They would not purchase until that judgment had been confirmed beyond reversal, by the acquiescence of all the parties in interest for three years, being the full period allowed for the disturbance of rights sanctioned by judgment." Thus, the rights were fixed by the decision in the foreclosure suit, and by time, before their purchase.

ABSTRACT OF ARGUMENT FOR APPELLANT.

As preliminary, Mr. BUSH claimed that the issues and defenses made in the pleadings were different from those argued, in this: 1. Appellees did not plead that the appellant was estopped

by the judgment of sale and confirmation in the foreclosure suit; 2. Nor that appellant had acquiesced in Bowler's purchase for his own benefit; 3. Nor that Bowler had offered to surrender the road; 4. Nor that appellant had elected to permit Bowler or his associates to hold the road for their own benefit; 5. Nor that appellant was insolvent at the time of sale.

Mr. Bush also claimed, that inasmuch as the Circuit Court had "ADJUDGED:" 1. That the action was not barred by the Statute of Limitations; 2. That none of the defendants were innocent purchasers; 3. That the Kenton Circuit Court had jurisdiction; and 4. That the appellant had the right to claim the benefit of Bowler's purchase; and appellees not taking a cross-appeal therefrom,—they had, in regard to such defenses, ACQUIRED in the judgment of the Circuit Court thereon.

I.—AS TO THE APPELLANT BEING A CORPORATION.

This point having been twice passed upon in the Circuit Court, and both times decided in favor of appellant, by Judge Doniphan and the Special Judge, it received but little consideration in the Court of Appeals.

1. It was claimed, that the Legislature had not delegated the power to pledge the franchise of existence; that it had not been pledged, and consequently could not have been sold. The sale of the franchise of running and maintaining a railway was admitted to have been sold.

2. That the existence of the corporation was admitted by the stockholders being called together at the annual meeting after the sale; the efforts made to procure an approval of the sale from them; Bowler's pretended offer to return the road to them, and his negotiations with its agents.

II.—THE QUESTION AS TO JURISDICTION.

On behalf of the appellant, it was claimed, that the petition in this cause was founded on an original cause of action, distinct, in itself, against Bowler and his representatives, the appellees; and no reversal or interference with the Fayette judgment was asked.

1. If the road is not in the possession of appellees, but in possession of the Court, and the rights of appellees are inchoate

and imperfect, and they are the agents of the Court, then the appellant's right of action has not yet accrued. Consequently, the other defenses of a bar by the *Statute of Limitations*, *acquiescence*, *lapse of time*, and *laches*, are inconsistent and unavailing in this case. But the appellant is not attacking the decree of the Fayette Circuit Court for fraud or for any other cause. There is no allegation of fraud against Winslow, or prayer for relief against him. This decree will stand for all time; and it is not asked to have it set aside, reversed, or modified in any manner.

Judge MATTHEWS cited Hill on Trustees, 144, as giving the principle upon which the case rests: "Whenever the circumstances of a transaction are such that the person who takes the legal estate in property can not also enjoy the beneficial interest, without necessarily violating some established principle of equity, the court will immediately raise a constructive trust, and fasten it upon the conscience of the legal owner, so as to convert him into a trustee for the parties who, in equity, are entitled to the beneficial enjoyment." To the same point were cited and read, *Meader v. Norton*, 11 Wallace, 457; Kerr on Fraud, 286; *Coke v. Izard*, 7 Wallace, 559; *James v. Railroad Company*, 6 Wallace, 752. The same principle had repeatedly been adjudicated in Kentucky. In *Blight's Heirs v. Tobin*, 7 Mon. 612, a defense similar to the one set up in this case, was made. That court there said: "We do not mean that a chancellor, in exercising this jurisdiction, will act as a revising court over the records of a court of law in executing their process, or make further use of errors of law than to prove or disprove the fairness or unfairness of the sale. We will treat all the proceedings at law as valid, although error may appear therein, and will relieve against the consequences thereof, because the rights acquired thereby can not be retained in conscience; and in doing so, we will treat the purchaser as a trustee of the estate, and will not compel him to surrender it until equity is done to him." To the same point, *Talbott v. Todd*, 5 Dana, 193; *Moore v. Simpson*, 5 Littell, 50.

III.—THE ALLEGED ESTOPPEL BY A FORMER ADJUDICATION.

1. To constitute estoppel, the subject-matter and the parties must be the same. In the Fayette Court, Winslow sought a sale

of the road to pay the interest on the mortgage debt. In this case, it is sought to charge Bowler as a trustee by reason of the circumstances attending his purchase at the sale demanded by Winslow, and that did not take place until the sale; "so that there is nothing prior to that time which can operate as an estoppel here, for the rights of the appellant began when Bowler became the confirmed purchaser of that title."

2. Estoppels are not favored in law; and can not be eked out by inferences or presumptions of what was decided.

A judgment on matters not put in issue is not binding, 5 Dana, 193. In *Marsh v. Eastern R. R. Co.*, 40 New Hamp. 567, the rule is stated as to when stockholders are proper parties to a suit; but in the present suit the stockholders were not admitted as parties litigant. "The question of fraud in Bowler's purchase could not have been made before the judgment in Fayette," says the Special Judge, Record, page 68; and Judge GOODLOE, in refusing to allow the answer of Branham and other stockholders to be filed as a *cross-petition*, refused to allow the issue to be made in the case.

Judge Matthews examined the claim made by appellees' counsel, that Judge GOODLOE having overruled the exceptions of Branham and others to the confirmation of the sale, because he had made the purchase for his individual benefit, it was deciding that Bowler had a right in equity as against the corporation, to purchase and hold the property for his own use. The judge may have thought that Bowler knew he could not purchase and hold in his individual right, being a director, and considering that he did make the purchase as trustee, have overruled the exception as not true. But there was evidence in the Record, page 392, if it was admissible, that the judge held that that question did not arise in the case, and declined to meddle with it.

As to Bowler being admitted as a bidder by the Court, Judge Matthews claimed that "the doctrine of the sanction of courts of equity to sales of trust property, where they are sought to be purchased, or have been purchased, or are about to be purchased by a person occupying a fiduciary relation toward that property, does not apply as between a trustee and *cestui que trust*, where both parties are *sui juris*. The court of equity has no juris-

diction, as between parties capable of authorizing or assenting to the sale, saying you shall or shall not;" and was so held by the great equity judge, Lord ELDON, in *ex parte James*, 8 Vesey, 352.

The case of *Bronson v. La Crosse R. R. Co.*, 2 Wallace, 301, was cited as deciding that the appellant was not barred by acts of stockholders similar to those of Branham and others. In such cases, their acts bound nobody but themselves, because they appear only for themselves, and their corporations have a separate existence and powers.

Mr. Bowler, being a director of the corporation, and representing it in the foreclosure suit, Judge Matthews claimed that it was a presumption of the law, arising from the relation then existing between the parties, that whatever it did in that suit, or omitted to do, was done or omitted by Mr. Bowler; and this aside from any evidence as to his acts or motives. "In the foreclosure suit in Fayette County, the corporation was present as a party, but was chained; bound hand and foot. It was a captive to Bowler by operation of law; it could not open its mouth, or lift its hand; it could not object, it could not protest; and, consequently, it could not be estopped. Then, where is your estoppel? Let Branham be estopped; let Desha be estopped; let every stockholder be estopped; the corporation is not estopped. The corporation is the present complainant. It has not only an existence distinct from, it has rights and titles above, those of stockholders."

Mr. STANBERY claimed, that inasmuch as the appellant alleged actual fraud on the part of Bowler, in bringing about the sale of the road, the action of the court in overruling the exceptions of Branham could not estop the appellant. He cited the case of the *Packet Company v. Sickles*, 5 Wallace, 592, to show that the law of estoppel did not apply at all to the present case, or admit of the construction appellees put upon the overruling of Branham's exceptions.

3. It was denied that it was adjudicated in the foreclosure suit, that the company was insolvent when ordered to be sold. It was merely the *opinion* of GOODLOE, as a judge, that it was so, and which, in his opinion, justified him in ordering the road to be sold, instead of placing it in the hands of a Receiver. And

this belief of Judge GOODLOE, being produced by Bowler, and the President and directors under his influence, was a fraud, in violation of their trust, that would not operate as an estoppel, even if *adjudged* by the court.

4. As to the estoppel of appellant against any equitable claim to limit Bowler to the cost of his bonds (by reason of his scheme to depress them, buy them in, and thus ward off any opposition to his becoming the purchaser of the road), because the Fayette Court ordered them to be paid, principal and interest: it has a double aspect. He thus gets for second mortgage bonds which cost him forty-five and fifty cents on the dollar, for third mortgages which cost from thirty to forty-five cents, and for the incomes which he bought at nominal prices, *principal and interest!* And there is no loss to Bowler, but an immense speculation, which he made at the sacrifice of the entire property of his beneficiary. But the court did not order the payment of his bonds that were not reached by the amount of his bid; and as to them, there can be no estoppel to prevent a court of equity to inquire if they were not purchased for an illegal purpose, as part of his scheme to obtain the property of his beneficiary, and thus a legal claim only to the amount of their cost and interest.

IV.—LIMITATION BY TIME, AND BY THE OPERATION OF THE STATUTE.

1. Appellant's counsel claimed that the time within which it was necessary to bring the suit, was fixed by the statute; and that in this respect "equity followed the law;" and no earlier period would bar in equity than that named in the statute, unless it amounted to an estoppel *in pais*.

No *Acquiescence* short of that named in the statute will constitute a bar, "as it is merely inaction, and is the very thing which the statute contemplates as creating the limitation which cuts off the right," *Bower v. Earl*, 18 Mich. 373. To the same point were cited *Williams v. Chaption*, 6 Ohio, 169. "Acquiescence, without full and sufficient knowledge of the real nature and effect of the instrument, can be of no avail," *Prideaux v. Lonsdale*, 11 Weekly Law Reporter, 531. "A *cestui que trust* discovering a breach of trust, but not receiving any benefit from it, or conniving in it for any purpose, and not recognizing the

transaction, is not precluded from complaining of it merely on the ground that he abstained from making the complaint" six years after he knew of its existence, *Gatty v. Phillipson*, 27 Eng. Ch. (7 Haire), 516. In *Butler v. Carter*, 5 Eng. Ch. Cases, 276, the trustee was also the *cestui que trust*; and although for eight years he *acquiesced* in a loss of the trust estate, he afterward held the representative of the trust estate responsible, and recovered in the action.

If by *act of appellant*, Bowler would have been led to the purchase, or induced to part with his money; or, if appellant had in any way led him to do some act by which it would afterward be in bad faith on their part to seek the recovery of the road, then it would have been a binding acquiescence, or such an estoppel as would have barred this suit, *Davidson v. Barclay*, 36 Penn. 406; *Bankart v. Tenant*, 10 Eq. Cases (L. R. S.) 145; *Coleman v. Eastern Counties R. R. Co.*, 4 Eng. Railway Cases, 513.

Judge WARDEN made the following points:

(1.) In effect, the pretended acquiescence was a mere failure to exercise at once the option of a *cestui que trust* to have the benefit of a purchase at judicial sale of the trust property, *Fleming v. Teran*, 12 Geo. 394; *Pindler v. Atkinson*, 3 Md. 410; *Ridout v. Ringgold*, 7 Gill & Johns. 1; *Bell v. Webb & Mong*, 2 Gill, 170; *Mong v. Bell*, 7 Gill, 244; *Freeman v. Starwood*, 49 Maine, 195; *Morris v. West*, 1 West Va. 256.

(2.) These cases and elementary considerations are to the effect, that, though a trustee may purchase at judicial sale, not brought about by him, and may, upon the subsequent taking of the property by the *cestui que trust*, be entitled to reimbursement for the purchase, he can not deprive the *cestui que trust* of the benefit arising from the purchase. It follows, that if there was a benefit from the Bowler purchase, he and his associates in the directory ought to have claimed that benefit for the corporation, and if they pretended to refer the question thereupon arising to the stockholders, the authorities elsewhere cited show, that the *stockholders should have been perfectly informed of all matter, whether of law or fact, which might properly affect their determination*, *Hoffman Coal Co. v. Cumberland Co.*, ante, 97; *Lewin on Trusts*, 615.

(3.) On account of the failure to comply with this requirement

of the law, Bowler could have no benefit of the pretended acquiescence, *Gowland v. DeFaria*, 17 Ves. 25.

(4.) Binding acquiescence is in the nature of estoppel *in pais*. *Pearce v. Madison & Ind. R. R. Co.*, 21 How. 441; *Goodin v. Evans*, 18 Ohio St. 166; *Hoffman Steam Coal Co. v. Cumberland Coal & Iron Co.*, 16 Md. 457; *Zabriskie v. Cleveland, Columbus & Cincinnati Railway*, 23 How. 381; *Sparks v. Shropshire*, 4 W. P. Bush, 552.

(5.) We admit that "the community at large must form their judgment of the conduct of a corporation from an external position"—see *Zabriskie v. C. C. & C. Railway*, *supra*—but we deny that Bowler's relation to this company was that of the community at large. As to him, the alleged acquiescence could not have the effect of estoppel *in pais*. He can not be allowed to allege his own acquiescence in his own abuse of trust. He can not be allowed to allege an acquiescence on the part of his co-directors to which his own acquiescence contributed, and which his own undue influence in effect produced. It will charge him with the whole responsibility for such pretended acquiescence, and will therefore pronounce the acquiescence void *ab initio*, as to him.

(6.) Even if the case were, that all of the other directors had conspired with Bowler to betray the corporation, equity would not deny the remedy sought in this proceeding. In that case, to allow one of the directors to take the benefit of the wrong in which he had participated, simply because his co-trustees had been *participes fraudis* with him, would be a violation of the rule, that no man shall have advantage of his own wrong, and would be forbidden by every just consideration of public policy.

(7.) Should the decision of this case allow to Bowler's estate the benefit of the pretended acquiescence, a most valuable opportunity to advance at once the material interests and the moral interests of the business community, would be thrown away. In that case, men would still be encouraged to engage in railroading, not with public objects, but with objects such as those of Bowler, which, according to his own account, were not such objects as a trustee is obliged to have in the performance of his trust.

2. *The offer to restore the road to appellant, and their alleged election to allow Bowler to keep it.*—It purports to be an offer to return the road at what it "cost" Bowler. That implies what

counsel say it meant, to give the stockholders (by which appellant is meant) the benefit of Bowler's sharp bargains. To what it *cost* him should be added, of course, all he paid from his own means, after the purchase; and that he did not pay much is seen from Mr. Dudley's deposition, showing that he received from the road almost as much as he paid out, even aside from his borrowings from the fund in Dudley's hands. The *cost* includes all Bowler's investments in the road. Mr. Walker estimated the entire *cost* at \$483,000, and that, with interest, or something like that sum, would be the basis upon which to arrive at the amount for which the road should be surrendered. But that was not his proposition, for after showing \$797,335, not covered by the sale, he adds: whatever "these securities actually *cost* me, with interest, must be paid, in addition to the \$2,125,000, the road brought." So it appears that HE was to have all the benefit of his sharp bargains in buying second mortgages at forty-five cents, thirds at twenty-five cents, and preferred incomes at thirty-five cents on the dollar, instead of the appellant! This was to be his compensation for the sharp operation of bringing the road to sale, and securing the purchase. In the case cited, and herein reported, page 418, the court found the proposition to return to be entirely fair. That Bowler required a bonus, is shown by appellees' own witness, Mr. Dudley, to whom he offered the road for \$450,000 and his bid. He asked the committee who called upon him, \$500,000 for his bargain. The refusal of the appellant to *run after* such a proposition (for it was never properly made to the company) can not certainly be claimed to be an *election* to allow Bowler to keep the road. When he was properly applied to, he insults part, and endeavored to bribe the third member of the committee.

3. *As to the Statute of Limitations.*—Mr. Myers claimed that previous to the Revised Statutes of 1852, there was no provision limiting the class of cases now known as *suits for relief on the ground of fraud*. Mr. Johnson, in his brief, page 51, says the "action on the case" was the remedy in such suits previous to that time.

As heretofore, appellant's counsel claimed that this suit was an original action; and as it does not seek the remedies indicated by defendants' counsel, the provisions of the Code referred

to by them, do not apply. *Blight's Heirs v. Tobin*, 7 Mon. 612, was referred to as settling appellees' claim that this action was barred in three years. Therein the Court of Appeals "decided that the statutory limitation to a motion to quash a sheriff's sale for fraud should not be adopted, by analogy, as a bar to a bill in chancery for the same purpose." And *Howell's Heirs v. McCrary*, 7 Dana, 388, was quoted as follows: "As this suit is brought, *not for damages for fraud*, but for a cancelment of the deed and a restitution of the land, it is virtually a proceeding *in rem*; and a prayer for a *cancelment* of the sheriff's deed is only subsidiary to the chief end of obtaining the land itself. Such a suit in equity should not be barred by adopting the legal limitation to an action for fraud, which confirms the contract. The only suitable analogy is an action for the land founded on a right of entry, which would not, as we think, be barred by a shorter limitation than that of twenty years, even though the defending party should rely on a fraudulent deed more than five years old. As long as the action itself is not barred by time, the right to prove any fact material to the maintenance of it, should not, in our opinion, be barred by any statutory or prescriptive limitation. We have not seen a case in which a suit in chancery, to recover land and set aside a fraudulent deed in subservience to that end, was ever barred by the lapse of five years, or by less than what would bar a suit for the land founded on any other equity; and we can perceive no reason or analogy which should prescribe any other limitation in the one case than the other. In each the object is the same, to wit: the land, or the security of the title thereto; and therefore, in each, the limitation should be the same."

Numerous cases were cited of suits in chancery for the recovery of real estate, wherein the statutory limitation in regard to suits at law for the same purpose, were held to govern, *Findley v. Langford*, 1 Marsh. 364; *Crane v. Prather*, 4 J. J. Marsh. 77; *Severns v. Hill*, 3 Bibb, 240; *Ogden v. Walker's Heirs*, 6 Dana, 421; *Patrick's Heirs v. Chenault*, 6 B. Mon. 321; *Baker v. Whiting*, 3 Sumner, 485; *Oliver v. Piatt*, 3 How. 333; *Chalmondely v. Clinton*, 2 Jac. & Wal. 139; *Michaud v. Girod*, 4 How. 561; *Butler v. Haskell*, 4 Dessaus. S. C. 702; *Kane county v. Harrington*, 50 Illinois, 232; *Walleth v. Collins*, 10 How. 186;

Leeds v. Amherst, 22 English Ch. (2 Phillips), 116; *Lord v. Jeffkins*, 35 Beavan, 7.

Numerous cases were also cited wherein the suits were concerning *personal property*, and the statutes of limitation were followed by analogy: "Where a party claims to hold another a trustee of personal property under a constructive trust, he must assert the claim within six years from the time the trust is alleged to have originated, *in analogy to the Statute of Limitations*," *Ashhurst's Appeal*, 60 Penn. 290.

4. *Necessary parties as defendants*.—Story's Equity Pl., sec. 207, p. 236, lays down the general rule and the principles of it as follows: "That in suits respecting the trust property, brought either by or against the trustees, the *cestuis que trust* (or beneficiaries), as well as the trustees, are necessary parties. And where the suit is by or against the *cestuis que trust* (or beneficiaries), the trustees are also necessary parties. The trustees have the legal interest, and therefore they are necessary parties. The *cestuis que trust* (or beneficiaries) have the equitable and ultimate interest to be affected by the decree, and therefore they are necessary parties." "The beneficiaries are, emphatically, the direct parties in interest." *Vorhees v. Baxter*, 1 Abbott, 45, was cited as a decision on the 118th section of the New York Code, which is the same as the 35th section of the Kentucky Code. Mr. Stanbery said that the conveyance to Ernst and Keith "was a dry, naked trust to hold the title of the road. It was not transferred to the possession of the trustees to hold. They had no duty to perform, no land to use, no property to take charge of, improve, and protect. Not at all. That was not their business. The possession of the road was retained by the beneficiaries under that trust. Will the gentlemen tell me that, with fraud charged against Bowler, we could sue these naked owners of the legal title, and omit to sue Bowler's administrators and his heirs?"

V.—AS TO THE DEFENSE ON THE MERITS OF THE CASE.

1. *Insolvency of the Company*.—With the small deficits figured out by Mr. Johnson, the solvency of the road may well be assumed as a matter of fact. Besides, its *prospects* gave it value.

All agree that the business and earnings were steadily increasing, as this table abundantly proves :

EARNINGS OF THE ROAD.

Year.	Earnings.	Current Expenses.		Net Earnings.
1854,	\$87,964 38	\$68,208 84—55 per cent of earnings,	.	\$37,208 84
1855,	264,973 66	126,279 55—52 ¹ / ₂ " "	.	138,694 11
1856,	399,948 12	(219,971 76—estimated at 55 per cent	.	179,976 66)
1857,	426,408 36	221,105 87	205,302 49
1858,	437,579 02	239,262 22	198,316 80
1859,*	458,820 99	231,086 22	227,734 77

* In 1859, the earnings for only 11 months and 5 days.

\$987,228 67

But what relevancy has this question to the case? And if actually insolvent, it was produced by Bowler and his Board. The appellant paid the directors' debt to the amount of \$71,328.33; and at the same terms upon which the third mortgage bonds were sold to Walker, the company was entitled to a rebate of twice that amount, to wit: \$142,656.66. There should have been that amount less of third mortgage bonds; and that alone would show solvency. Bowler was present at the meeting when this was ordered, makes no objection, and did actually concur therein. He is, therefore, responsible. In passing, is not this a noticeable point in the management of the company by Mr. Bowler? As the "Proposition to Bondholders" says \$100,000 of the third mortgages were in the control of the Board when they paid the debt for which the bonds were given, how came these bonds into Mr. Bowler's hands? And poor as this appellant then was, it loaned the millionaire, Bowler, \$11,000!

2. This part of the case involves Mr. Bowler's acts in the management of his trust, and gives it the character of a narrative of his personal transactions as a director and manager of the company. It embraces the charge of fraud against him, and was so considered by Mr. Stanbery, who said: "I shall try Bowler by his conduct. I desire to try him by no other standard than that. I shall try him by his declarations and by his acts. Whatever they make out, whatever they produce, it is not I that produce them; it is Bowler himself. It is an unpleasant task for me, when this duty is in reference to a man who has passed away, whom I knew, and when those who survive him are persons whom I greatly respect; but it is a duty which can not be laid aside." Mr. S. proceeded upon the same point: "Now, what are the charges of fraud? They are, that

being our director and trustee, he commenced arrangements to possess himself of our property. That he did this by constantly vilifying our credit; by saying to the holders of our securities, 'They are worthless,' and buying them up at the same time; by alarming parties that could injure us, the holders of mortgage liens, and inducing them to commence operations against us when we were unprepared; by wasting, and assisting to waste, our means by which we could defend ourselves against the suit of Winslow; by entering into schemes and conspiracies; by combining with parties to purchase our road, he himself being a director of the road, it being his duty to defend us against that sale, and delay it as far as possible; by preparing himself—long before the decree, before it was said the road should be sold—to be the purchaser; by corrupting his co-trustees, and inducing them to follow out his plans and assisting him in getting our road." Upon the point of trusteeship, Mr. Stanbery said: "At last the gentlemen acknowledge that he was a trustee. But their ideas of his trusteeship are curious. His relation to the stockholders, according to Mr. Benton, is the relation I would bear to that gentleman if he loaned me his pen-knife, inasmuch as I would then be trustee of his property. The parallel would come much nearer this case if, with his pen-knife I had cut his throat. They say he became a director unwillingly; that he was solicited once, twice, three times. Richard was offered the crown, but he did not want it; he takes it, however."

Mr. FISK said: "Appellees argue that Bowler was compelled to buy the road to save himself from loss. The emptiness of this plea is shown when we consider the chicanery, cunning, and craft he used in the obtention of the securities. Having by these means become possessed of these securities—thirds and incomes—they say he was justified in bidding in the road, to save himself from loss. The proof shows that he was the chief agitator; the one malignant malcontent whose burning cupidity could not be quenched until he had managed the finances, to make the saving of the road (upon his showing) appear impossible; and then, the ripe pear fell into his rapacious maw. To save himself? No! That is not the phrase. To enrich himself upon the ruin of all other interests trusted to his unfaithful

keeping, is the equitable translation of all his well-simulated alarms. Let him and his now come in and do equity, and receive justice."

These charges will be the better understood by briefly referring to some of the specific acts relied upon by the appellant's counsel, presented by brief and in oral argument.

(1.) Before Mr. Bowler became a director, his relations to the company consisted in his buying its stock and bonds, and indorsing for the company, for which he was paid "liberally." He was not a broker, or "Third-street sharper," like Mowry, Keys, or Vallette, but a merchant. Neither was he an original subscriber to the stock of the company. He solicited votes to become a director.

(2.) Being esteemed by the community "a man of wonderful energy of character and activity, of large means and great resources, and with few equals as a financier," as Mr. Benton says, he at once became "the leading man in the company," and "was always to be consulted before any important action was to be taken." No value could be given to the third mortgage bonds "without the co-operation of Mr. Bowler," and he "exercised a controlling influence over the affairs of the road." In fine, he became the president and directors in one: the "Railroad King." Whatever of importance was done after that, was done by Mr. Bowler.

(3.) His very first act, on the second day of his election, was to have himself appointed on a committee to confer with the holders of third mortgage bonds, in which he was greatly interested. This position of intermediary he always retained, where he could represent the bonds as worthless and the company as bankrupt, which he at all times took great care to do, until he had accomplished his purpose in becoming the purchaser of the road.

(4.) As early as May 13, 1858, he moved for a better depot at Covington; and ever after, until the sale, it and other forced needs were made the pretext for the non-payment of the interest on the second mortgage bonds. But to this day, the cars stop in the streets of Covington, as ever before; and a rented waiting-room adjoining the refreshments has, ever since that event, answered the purposes of the \$20,000 depot: so urgently needed in

1858 and 1859, as to require the sacrifice of all interest of the stockholders in the entire road.

(5.) At the same meeting, a committee, headed by the President, reported in favor of paying Mr. Bowler and the other holders of third mortgage bonds, their interest; but he was not ready. He was on a committee "to report a plan of operations to the bondholders;" and, on the 19th of June, 1858, he *was ready* with the "\$800,000 circular." It gave him his interest! He wanted that; he wanted to buy bonds; and above all, he wanted the road! And this financial measure is paraded by counsel as evidence of Bowler's good faith!

SOME FEATURES OF THE 800,000 CIRCULAR.—(1.) Only nine days before its adoption, a committee reported that the road was unable to pay the interest on the third mortgage bonds, and showed that \$145,600 was needed for the road. When it was adopted, these needs had increased to \$800,000, and the interest was paid! Was there any other reason for its payment than Bowler's claim to the major part of it; and to cause the second mortgage bondholders to sue, and bring the road to sale?

(2.) In it, the third mortgage bonds are given as \$498,000, with the explanation that "\$100,000 may be considered under the control of the company." Why under the control of the company? Because, by the Walker contract they were left on deposit as part security for the payment of the "old bank debt of the company." The company paid it to the extent of \$71,328.33, but Bowler got Walker's bonds! How is that explained? Is not that willful waste of the means of the company in its very hour of need? Would Mr. Benton, or Mr. Johnson, or Mr. Bowler have so managed their private business?

(3.) Mr. Johnson says it was unanimously adopted. Three members of the Board were absent; and it does not appear, from the minutes, to have been adopted at all! Mr. Levis had a called meeting; the committee reported; and thereupon it was acted upon as having been adopted.

(4.) It is urged that the "Proposition to Bondholders" presented the only feasible plan for preserving the road. Preserve it for whom? Certainly not for the company; for Mr. Clement had already furnished the safe and practical plan. But that was not enough to scare the bond and stockholders; nor enough to

justify a suspension of interest, "bear" the bonds, and bring on a sale of the road. Does a prudent man, who wishes the aid of his creditors, magnify his needs? If the "preservation" of the road was desired, why was not Gest's proposition to lease accepted?

3. *Approval by acts of the stockholders.*—As an instance, and to illustrate all similar pretended "approvals," it was denied that the stockholders, at their annual meeting in 1858, in "adopting" and ordering the annual report to be printed, "sanctioned and approved" the "\$800,000 circular." That, under the circumstances, was merely adopting it as the annual report; and, inasmuch as there was no hint toward a sale of the road, and little else in the report than fair promises for the future, and protestations of honesty and integrity on behalf of the directors, it can not be claimed to be an approval, and consequently an estoppel of the appellant from alleging, on discovering its real object, the issuing of the circular as one link in a concurrent chain of circumstances plainly pointing to Bowler's intention to bring the road to sale. The issue of approval or disapproval was never raised until the annual meeting after the sale, in 1859, and then it was disapproved, against all the wiles and threats of Bowler, Benton, and their friends.

4. *The pretended defense in the foreclosure suit.*—(1.) It is claimed to have been real. If so, why did not the directors pay into court the net earnings, as they promised to do in their answer, instead of diverting them to pay the directors' debt? The contract to pay it had been negotiated by Benton, and approved by the Board; and there was full security for its performance. *It was performed!* Why should the means of the company be diverted, to repay what had already been provided and paid, except to precipitate the sale? The directors had no right to prefer this debt, even if it had not been paid by the Walkers, because they were indorsers, *Drury v. Cross*, 7 Wallace, 299.

(2.) From the 16th day of June to 30th September 1859, \$73,056.36 was paid by the company to "Levis, Benton, and Casey, Trustees," for the directors' debt. (See Exhibit B, Record, page 254.) In confirmation, see Record, page 115, Exhibit D, to George M. Clark's deposition, in which is shown this item of "disbursements" by the company: "For old bank debt of the company, \$71,328.33."

(3.) The same Exhibit D, Record, page 115: "For current running expenses, including balance due November 1, 1858, \$253,844.84." This left (see Exhibit C, same page of Record) a "balance, being net earnings for eleven months and five days, \$227,734.77!" Could not this \$70,000 interest, and by 1st September, 1859, swollen to \$105,000, have been paid from this "*net earnings*," if Bowler, the manager, had so willed?

(4.) See Exhibit B, to E. B. Clark's deposition (Record, page 255), by which it appears that these same trustees, Levis, Benton, and Casey, had, and STILL HAVE, from all that appears, a balance of \$46,500.33 of the moneys of the company in their hands. If they have not this balance, which is charged to "profit and loss," they have not shown where it is. Surely, these appellees, with the appellant's books in their hands, could have shown where the money went, if it had gone to any honest purpose.

5. *Why would not the payment into Court have prevented a sale of the Road?*—Mr. Johnson says it would probably have been done if that had defeated the suit or produced any "valuable delay." If Mr. Bowler had not urged a sale, who else was there to do so? All the other parties were asking a Receiver, and were opposing a sale. This is admitted by appellees. The case was simply this: Winslow was asking for his interest; and Bowler was urging a sale, and opposed to a Receiver! He said so to Vallette, and he swore to it besides.

In notes to Mr. Johnson's brief, it is claimed that the judgment for sale released Bowler from any further responsibility as a director and trustee! It had just the reverse effect. It made it more urgent on him to preserve the road. Just as the troubles and embarrassments increased, his duty to use every effort in behalf of his trust became more urgent. To claim that the Fayette Court, by a judgment of sale, could release Bowler from his obligations as trustee, is worse than absurd,—it is an argument for the toleration of dishonesty!

6. *Bowler's right to purchase the securities of the Company while director.*—When Bowler found that his duty as a director conflicted with his individual interest, it was his duty to resign his directorship, *Goodin v. Whitewater Canal Co.*, 18 Ohio St. 169. Remaining director, after such discovery, does not

authorize him to pursue his individual interest at the sacrifice of his trust. Therefore he could not use the information he obtained as director to speculate in the securities, by "*bearing*" them, and thus injure the credit of the company, and cause the creditors to be more strenuous. He had no right thus to prepare himself to be the purchaser by buying off all opposition, and standing the unopposed bidder at the sale, *Drury v. Cross*, 7 Wallace, 299. Directors, in the cases instanced by counsel for appellees, invested in the securities of their roads for the purpose of aiding them; and not to gain undue advantages for the purpose of *investing themselves* with the road itself, or to become the owner of the trust property. And whatever may have been Bowler's original purposes, if these purposes finally assumed the object of buying the road, after that, such acts became breaches of trust, and he can take no advantage therefrom.

7. *Mr. Bowler's speculation in purchasing the Road.*—This is denied by appellees' counsel, and, as evidence of it, they refer to his sale to Stevenson, Keith, and others; but carefully omit any reference to Mr. Levis's deposition, where he explains the contract. It appears, in these transactions, two sets of papers were executed: one for the public, to be recorded, and the other for the private use of the parties; and Mr. Levis says, when he retired from the road his contract of the latter character was destroyed. In his second deposition, Record, page 342, he explains the terms of the contract of sale to these gentlemen. It was similar to the one made with himself, Gedge, and others, previously; or rather, Mr. Levis retired, and the number of joint owners was increased. "Mr. Bowler made a stock for the road amounting to \$1,100,000, subject to the mortgage debt." This was \$1,737,000, and adding the stock, made the sale price, as to the original company, \$2,837,000. This stock he offered "to the purchasers at fifty cents on the dollar, but how much they decided on I never knew." It appears from the recorded papers that Mr. Bowler received from his new partners \$110,000. If that represents the interest conveyed, and Mr. Bowler received only fifty cents on the dollar of that amount, he still held \$945,000 of the stock. If it represents the true amount received, and fifty per cent more was added, then he still retained \$880,000 of the stock. The loss is not apparent. Besides, where gentlemen

keep two sets of papers, if they do not explain the true meaning, the inference is, that if shown, they would be unfavorable to the party having the power so to do. So the whole matter is, that in the stock made of \$1,100,000, Mr. Bowler sold \$110,000 thereof at fifty cents on the dollar, and that was all his loss. But what did he give for his \$1,100,000 of stock?

8. *Peculiarities in the defense.*—Messrs. Benton, Levis, and Bowler, previous to the sale, were loud and eloquent in the praises of the road. In general terms, it was “a great institution!” But when it was sold, it was not worth an exception to the confirmation, or a prayer for an appeal! After that, it was unbalanced, it needed new iron, its right of way was not paid for, the bridges were rotten, etc. The stockholders, in the first place, believed what Messrs. Benton, Levis, and Bowler said about the great value of their property, and re-elected them their officers. They thought their President and directors were honest men, and were telling the truth when they spoke thus of the value of the road, its great prospects, and that they were managing every thing for the best. Are they to be blamed for reposing generous confidence in these gentlemen? If they are, then we must now allow them to have been getting the money of the stockholders and bondholders under false pretenses. But appellant’s counsel would save those gentlemen’s reputation from such *hari kari*. Mr. Benton is to be believed as President, in preference to Mr. Benton as a feed attorney; and Levis and Bowler had not then planned the “\$800,000 circular,” and the sale of the road! But the stockholders did begin to doubt Bowler; for on his second election he received 1,223 less votes than the average vote of his associates in the Board. It took some time for these confiding stockholders to be undeceived. Is one short year too brief a period within which to have the scales removed from their blinded eyes? The authorities are, that to constitute a binding confirmation, the party to be estopped must be fully aware of every *material circumstance of the transaction*, and “apprised of the law, how those facts would be dealt with if brought before a court of equity,” *Hoffman Coal Co. v. Cumberland Coal Co.*, 16 Maryland, 456; Lewin on Trusts (Ed. of 1858), 615. It has been shown that Bowler was virtually, the company, until the election in 1859. Until that time, as has

already been said, Bowler had it "bound hand and foot!" How, then, could even Branham and others, by their acts, have worked a binding estoppel against themselves? But they were not the company; for, "If the whole body of members existing at any given time be collected together within our view, we do not see the corporation, although we see the existing corporators; for the corporation is identified not with them, but with them, their predecessors, and successors," Grant on Corporations, 2; American Ed. of 1854, 14.

VI.—ERNST AND ASSOCIATES NOT INNOCENT PURCHASERS.

They had actual notice.—Gedge bid off the road, and was a director. Stevenson was attorney in the foreclosure suit. Ernst was a bidder on the road, and afterward, as President of the Covington City Council, endeavored to prevent suit for its recovery. Stowers was a director elected to sue for the road. Keith and Hathaway were holders of bonds, and knew all about the sale, or were chargeable with such notice as would put a prudent person on inquiry, which is equivalent to actual notice, *Cotton v. Hart*, 1 Marshall, 58. They are *estopped* from denying notice by the recitals in the deed under which they claim, in which the sale to Bowler is referred to as the foundation of their titles. They did not pay a round price, but only thirty to fifty cents on the dollar; for that took ample security, and can not be injured by appellant's recovery.

OPINION OF THE COURT.

On the 25th of April, 1873, Judge LINDSAY, on the part of the Court, delivered the following opinion:

The Covington and Lexington Railroad Company, a corporation created by the laws of the State of Kentucky, had constructed, and in the year 1858 was operating, its road from the city of Covington, in Kenton County, to the town of Paris, in the county of Bourbon, and had also secured a lease, for the term of ten years, of the Maysville & Lexington Railroad, from Paris to the city of Lexington. Being largely indebted, the company made default in the payment of the interest falling due on certain of its bonds on the 1st of September, 1858; and on the 28th of November thereafter, James Winslow, Trustee,

in a deed of trust made and executed April 8, 1853, to secure the payment of the principal and interest of these bonds, instituted a suit in equity in the Fayette Circuit Court, setting up this default, and asking that the Court place him in possession of and allow him to control and manage the property of the company, for the purpose of paying the interest so in arrear, costs of suit, etc.

On the 27th of December, he amended his petition, and prayed an absolute sale of the property, rights, and franchises of the company. Other persons to whom the company was indebted, and who were interested in the subject-matter of the suit, made themselves parties thereto. After a feeble and ineffectual defense, a judgment was rendered directing the sale, as prayed for. On the 5th of October, 1859, all the property, rights, credits, and franchises of the company were sold at public auction for the sum of two million one hundred and twenty-five thousand dollars. William H. Gedge, who was at the time one of the directors of the company, was the ostensible purchaser; but the actual purchaser was R. B. Bowler, who was also a director. Bonds were executed, and securities deposited with the Court's Commissioner, as was required by the terms of the judgment.

Branham, Desha, and other stockholders, excepted to the confirmation of the sale; but, upon hearing, their exceptions were overruled, the sale confirmed, and the road and all its appurtenances delivered to the purchaser. By its judgment, the Court reserved "full power, by summary proceedings against the purchaser, to enforce compliance with all the terms of sale, and until full payment thereof, to coerce said purchaser to keep the road in good repair and order, so as to do the business of the railroad with safety and dispatch; and in case of default on the part of the purchaser in making payment, or in complying with any of the terms of the sale, or in keeping the property in good order and repair, may [might] appoint a receiver, or order a sale thereof." This judgment can not be fully executed for many years, as a large number of the bonds of the company will not mature until the year 1885.

On the 1st of January, 1861, Bowler and certain other persons formed a joint stock association for the purpose of acquiring,

holding, and operating the road. Afterward, on the 1st of January, 1863, other persons became interested in this association, and the title was vested in Q. A. Keith and William Ernst, who were to hold as trustees for the parties beneficially interested, upon the terms and conditions and for the uses and trusts set out and declared in a deed made and executed to them by Bowler and wife on the 30th of January, 1863.

On the 30th of September, 1865, the Covington and Lexington Railroad Company instituted this action in the Kenton Circuit Court against the trustees, Ernst and Keith, and the persons for whom they held, including the widow and infant children, and the personal representative of Bowler, who was then dead, seeking, among other things, to have the Court adjudge that the defendants held the road in trust for the benefit of the company, and to have the same, and the rights and franchises thereunto appertaining, surrendered to it. This relief was asked upon two grounds,—First: because Robert B. Bowler was a director of the company and a trustee for the stockholders at the time he purchased, and that, by the well-established rules of equity, his purchase inured to the benefit of his *cestuis que trust*. Second: because, prior to the sale, he had violated his duties as trustee by willfully mismanaging, or causing the Directory to mismanage and misappropriate, the funds of the company, with the view of bringing about the sale of the road, in order that he might be enabled to possess himself of the property intrusted by the stockholders to his care and management.

Appellees answered, pleading: First, to the jurisdiction of the Kenton Circuit Court; second, estoppel by reason of a former adjudication; third, that the action was barred by lapse of time; fourth, specific and general denials of all the material allegations of the petition; fifth, that all persons interested, except the personal representative, widow, and heirs-at-law of Bowler, were purchasers in good faith, for a valuable consideration, without notice, knowledge, or belief of the commission of any of the alleged frauds.

Certainly, the Kenton Circuit Court has no power to set aside, vacate, or modify the orders or judgments of the Fayette Circuit Court; and it is equally clear that "the judgments or decree of a court of competent jurisdiction is not only final as to all

matters determined by it, but it also is, in general, final as to every other matter incident to the cause which the parties might have put in issue and had litigated." But in this action, appellant can have relief without disturbing the judgment of the Fayette Circuit Court. That judgment may—in fact, must—remain in full force and effect until completely executed. The sale to Bowler can not be set aside, nor the order confirming it annulled, in this or any other collateral proceeding; but the Kenton Circuit Court, having jurisdiction of the persons to be affected by its judgment, may rightfully determine and declare whether or not the appellees, who claim under this sale, hold in trust for the railroad company.

The settlement of this question involves matters that were not pertinent to the suit in the Fayette Court. The right of Winslow and the creditors of the company represented by him, to have judgment for the sale of the road, was made perfect by the default, for sixty days after demand, in the payment of the interest due on the company's bonds. It was immaterial, so far as they were concerned, whether this default resulted from actual inability upon the part of their debtor to make the stipulated payment, or from the bad faith and mismanagement of Bowler and his co-directors. Besides, one of the grounds relied on for relief is the charge that the directors, acting under the influence and control of Bowler, willfully failed and refused to make an honest defense to Winslow's suit, and needlessly permitted judgment to be rendered in his favor, when it was within their power, by a proper application of the moneys of the company, to have redeemed the forfeiture and protracted the litigation until terms could have been made with the company's creditors, and its debts paid out of the rapidly increasing earnings of the road. The company could make defense to Winslow's suit only in its corporate capacity. With this defense, Bowler, as a member of the Board of Directors, was charged. If he failed to perform this duty, those claiming through him, or under and by virtue of his purchase, can not demand protection upon the idea that he failed to do all things necessary to induce the chancellor to exercise "a large equitable discretion in regard to the time and manner of enforcing Winslow's rights." It is of this failure the company now complains.

Even if it be true, as insisted by appellees, that the facts stated in the petition in this action would have constituted an equitable plea to the Court of Equity for relieving the company from the effect of the forfeiture incurred by the default in the payment of interest, and of giving time to redeem that forfeiture; yet as this equitable plea ought to have been interposed by the directors of the company, and was not, the failure to present it can not be regarded as a sufficient reason for protecting one of these faithless directors in the enjoyment of the profit he realized from his breach of official duty. The purchase at the decretal sale was the culminating act of the fraudulent mismanagement charged against Bowler and his associate directors, and it is the title or interest he acquired under that purchase with which the appellant here seeks to be invested. Winslow's judgment does not preclude it from seeking such relief in a new and independent action, and its right thereto was not and could not have been determined in his suit.

A judgment in favor of appellant need not result in a conflict of jurisdiction between the Kenton and Fayette Courts. It may be adjudged in this proceeding that Bowler held under his purchase, and that these appellees now hold in trust for the company, and that upon the performance of certain prescribed conditions, it is entitled not only to the property held, but to be substituted for the appellees in the management and control of that property; and yet it will be left for it to secure the exercise of this last-named right, by applying to the Fayette Court, and submitting to, and performing, the conditions imposed by its judgment upon the purchaser of the road—just as Ernst and Keith did when they appeared in that court, on the 11th of February, 1864, and claimed and were admitted to such right of substitution under and by virtue of the conveyance made to them as trustees by Bowler and wife, on the 30th of January, 1863. Neither court will be called upon to subordinate itself to the other. The Kenton Court will determine for whose benefit the appellees hold; and the Fayette Court will require the party claiming under this determination to hold and enjoy the property subject to the duty of performing the judgment in favor of Winslow in the exact manner prescribed by that judgment.

Bowler claimed that he had acquired under his purchase a

vendible interest in the property. These appellees have distinctly recognized this claim by purchasing interests in the joint stock association. Having an interest which may be sold and conveyed, if it be held in trust for another, and those holding it repudiate the trust, the beneficiary may undoubtedly call upon a court of equity to declare the existence of the trust, and to compel the recusant trustees to relinquish claim to the trust estate.

Incident to this question of jurisdiction comes up the plea of estoppel. When the Commissioner of the Fayette Court filed his report of the sale to Bowler, certain stockholders, representing themselves and other stockholders, with no authority to speak for the corporation, and not pretending to have any such right, excepted to its confirmation—among others—upon the ground that “W. H. Gedge, the ostensible bidder, and R. B. Bowler, the actual bidder, were, at the time of the sale, directors of the company, and, in the matter of said sale, acted against the direct interest and express wishes of the stockholders, and purchased for their individual benefit.” In passing upon and overruling this exception, the court determined the rights of those only who filed it. The stockholders, acting as individuals, could not raise an issue nor provoke a judgment that would bind the corporation. The company did not object to the confirmation of the sale, and raised no controversy as to the right of the chancellor to accept Bowler as a bidder, nor was it bound to raise this issue at that time; but even if, under ordinary circumstances, it would have been, this case would be an exception to the rule. There were then but eight directors in office. One of them was the bidder, and three others—John T. Lewis, the President, William H. Gedge, and B. W. Foley—became sureties on the bonds executed by the bidder. By becoming parties to the transaction, these four directors put it out of the power of the remaining four to act, and left the company without the legal capacity to object to the perpetration of the wrong of which it now complains. If Bowler desired to preclude the corporation by the judgment rendered upon the stockholders’ exceptions, he should have taken the proper steps to make it a party to the issue raised by those exceptions. He failed to do so, and its rights are not affected by that judgment, *Brown v.*

LaCrosse Railroad Company, 2 Wallace, 301; Angell & Ames on Corporations, section 370.

We do not regard this as an action for the recovery of real property, nor an action for relief on the ground of fraud, in the sense in which those terms are used in our Revised Statutes. It is a suit to declare and enforce an implied or constructive trust. The cause of action, if one exists, accrued when Bowler finally and decisively repudiated the claim of appellant, and asserted title in himself. The limitation to actions of this character is five years. Bowler, after the confirmation of the sale, recognized the claim of the company, and professed to be ready and willing to surrender the property purchased. He published in one of the Cincinnati newspapers a proposition looking to this end, which stood open till the stockholders' meeting on the 22d of December, 1859. This proposition was not accepted, and from that time forward he claimed the property as his own, and the statute then began to run in his favor. Five years, six months, and twenty-eight days elapsed before suit was brought. Bowler, however, died intestate on the fourth day of July, 1864. The statutory bar was not then complete. There was no administration upon his estate, in this state, until February 13, 1865. If the personal representative of Bowler is a necessary party to this action, it was commenced in time. Assuming, as must be done in settling this question, that Bowler originally held as trustee for the corporation, he could not, if living, have been required to surrender the property until he was placed in *statu quo*. He would be entitled to have restored to him, with legal interest, all moneys he had rightfully expended for the benefit of the company, and to reasonable compensation for his services, and to have himself and his estate relieved from all liability to the plaintiff, in the Fayette judgment. He would, however, be required to account to the company for the earnings of the road. As he is dead, this account can not be stated, and a judgment rendered thereon, either for or against the appellant, without the presence of his administrator. The execution of the conveyance of January 30, 1863, by which Ernst and Keith were constituted trustees for the joint stock association, does not dispense with the necessity of making Bowler's heirs and representatives parties. If a *cestui que trust* bring a

suit against a third person to whom the trustee has assigned the property in violation of the trust, the trustee should be made a party, for he is ultimately bound for the due fulfillment of the trust, Story's Eq. Pl. sec. 209; *Bust v. Dennet*, 2 Brown's Ch. 225; *Land v. Blanchard*, 4 Hare, 28.

Notwithstanding the assignment to Ernst and Keith, Bowler continued to occupy the relation of trustee for appellant, and in an action by the beneficiary to recover the trust property, his representative should be made a party. But if it be doubtful, in cases in which no settlement of accounts is necessary, whether the representative of the deceased trustee is an indispensable party, there can be no doubt but that *Bowler's heirs* are necessary parties to this action. This suit is in respect to the property held in trust for them by Ernst and Keith. It is not prosecuted merely to establish a debt or create a charge which the trustees will be compelled to satisfy out of the trust property, but it involves an absolute recovery of the property itself. In such a case, the beneficiaries, who have the equitable and ultimate interest to be affected, as well as the trustees, are necessary parties, Story's Eq. Pl. sec. 207; Mitford's Eq. Pl., by Jeremy, 176 to 179.

It is also to be observed that the conveyance under which Ernst and Keith hold as trustees, does not invest them with that character of title that will authorize them to represent their *cestuis que trust* in a suit prosecuted for the recovery of the absolute trust property. It is their duty as trustees to *hold* the property for the purposes and uses declared in the deed. They have no power to sell, and are to *hold*, "subject to the Board of Control" of the association; and if said "Board of Control" should appoint other trustees, they contract that they will convey the property to the new trustees, upon the uses and trusts declared in the conveyance to them. They have no power even to convey, except as directed by the "Board of Control," and then only for such purpose or purposes as may be calculated to promote the interests of those for whom they hold. Now, it is a well-established rule of equity practice that, if trustees have no power of disposition, persons having demands against the trust property, existing prior to the creation of the trust, can not enforce these demands without making the persons claiming the

benefit of the trust, parties to their suit, Story's Eq. Pl. sec. 140, and authorities cited. As it would have been impossible to settle the controversy without the presence of Bowler's heirs, the court would have brought them in of its own motion, before proceeding to judgment, if appellant had failed to make them parties, Sec. 40, Civil Code of Practice.

The death of Bowler so far interrupted the running of the statute as to authorize appellant to commence its action against his heirs and representatives after the expiration of five years from the accrual of its cause of action, provided it instituted its suit within one year after the qualification of his personal representative. It did commence its suit within a year after administration in this state, and its right to sue was saved by the exception stated, Sec. 5, art. 4, chap. 63, Rev. Stat. 132.

Bowler was not charged with the duty of selling the property intrusted to his management. Hence, he did not purchase at his own sale. But he was acting as trustee for the stockholders, and as agent and representative of the corporation, and was under obligations to use his best exertions in its behalf, in all matters relating to its affairs, and especially in a matter imperiling its very existence. He purchased the property of his *cestui que trust* at a sale made pursuant to a judgment from which he and his co-directors might have prosecuted an appeal. He thereby placed himself in a position in which his personal interests were adverse to those of the corporation. He continued to hold his place as a director until the sale was confirmed, and the road and its appurtenances delivered to him by the court, and until he was superseded by the election of a new Board. These facts are calculated to excite suspicion as to his faithfulness and diligence in the discharge of his fiducial duties.

He was made a director in 1857, and at once became the controlling member of the Board. His skill as a financier was recognized by his associates, and it is manifest, from the record before us, that they deferred to him in all matters of importance. When he came into the directory, he found the company greatly embarrassed. It had been forced to suspend the payment of interest accruing on some of its inferior securities. It was regarded as a matter of prime importance that its road should be put in good repair, and its rolling stock and machinery

increased. It was estimated by a committee of directors, reporting June 10, 1858, that to accomplish the ends proposed, would require about \$145,000. To use this sum would place it out of the power of the company to pay the next installment of interest on the third mortgage bonds, and it was resolved that this interest should not be paid. At the same meeting, the directors appointed a select committee to report a plan of operations to the holders of the company's bonds. Of this committee, Bowler was a member. On the 19th of the month, the committee reported that it would require nearly \$800,000 to put the road into complete condition, and that the expenditure of the amount indicated would render it necessary that the company should suspend the further payment of interest on all its indebtedness for the period of five years. This report was termed a "Proposition to Bondholders," and concluded with this extraordinary announcement: "Believing that it is to the interest of the bondholders to carry out the suggestion of this report, and that the repair and equipment of the road should be immediately commenced, the Board will proceed to do so, presuming that you will ratify this report." The Directory adopted the recommendation of the committee, and immediately resolved, "That so much of the resolution, passed at the regular meeting of the Board in this month, as declares the company unable to pay the December interest on the third mortgage bonds, be and the same is hereby rescinded;" and it was ordered that such interest be paid out of any moneys belonging to the company. Without waiting for a conference with the company's creditors, the directors proceeded to advertise for proposals for the repairs and improvements deemed necessary to put the road in a first-class condition.

The holders of the second mortgage bonds held a meeting on the 1st of November, 1858. They declined to accede to the "Proposition to Bondholders," and demanded that the interest then due on their bonds should be paid by the 1st of January, 1859. The Board of Directors, upon notification of this demand, directed its president to inform the committee of bondholders that it could not be complied with, in consequence of the absolute want of funds; but to give assurance that they had reason to believe that, during the year 1859, the company "would be enabled to pay fully the coupons on the first and second mort-

gage bonds, matured and maturing up to that time, and regularly to continue to do the same at all times thereafter." The result of this communication was the institution, on the 29th of November, 1858, of Winslow's suit. The regular meeting of the stockholders of the company was held on the 16th of December, 1858. The President, in his report to this meeting, did not allude to this suit, although he was served with process on the first day of that month. At this meeting, Bowler and his co-directors were continued in office.

Notwithstanding Winslow's suit, and the assurance given that the company would be able in 1859 to commence and thereafter continue the payment of interest accruing on its first and second mortgage bonds, the directory, immediately after the re-election of the members of the Board, proceeded to carry out the design of putting the road in complete condition. On the 14th of April, 1859, a committee, of which Bowler was a member, was appointed and clothed with full power "to ascertain and adopt the *best and most valuable improvement* across Townsend's Valley, for the *permanent future use* of the railroad, and, after consultation with a competent engineer, to put the same under immediate contract." April 28th, the Board determined, upon the recommendation of a committee composed of *Bowler, Gedge, and Foley*, to close a contract for the purchase of depot grounds in the city of Covington, and, on the 12th of May, the payment of twenty-seven thousand dollars, the purchase price therefor, was ordered.

Bowler was present, and an active participant in every meeting of the Board after his election as director, and until the road was sold and passed into his possession. The record discloses the further fact, that, during the most of the time he was acting for the company as director, he persistently depreciated the value of its bonds, and yet constantly bought them up at prices thus depreciated. In the Spring, Summer, and Autumn of 1859, Winslow was actively pressing his suit for a sale of the road, and Bowler was purchasing largely the inferior securities of the company, using the danger of the judicial sale, which it was his duty to avert, if possible, as proof that the price he was willing to give was their full value. By purchasing these securities, he placed himself in a position either to purchase the

road when sold, at greatly less than its value, or to realize immense profits upon the amounts invested in them. Before the sale of the road was adjudged, he held more than one-half of the third mortgage bonds, and \$369,000 of the income bonds of the company. Hence it was to his interest that the sale should be adjudged, and that no appeal should be prosecuted from the judgment when rendered. Accordingly, in August, 1859, he was contracting with other parties interested in these inferior securities, to establish a basis upon which to compromise their conflicting interests, should they, or either of them, purchase the road. From the moment that Bowler concluded to prepare for the purchase of the road, his personal interests became antagonistic to those of the corporation, and he should have ceased to act as a director. Instead, however, of doing so, he held on to his position; and when we contemplate his official acts in the light of subsequent events, we can not avoid the conclusion that, as a member of the Board of Directors, his influence was used for the promotion of his personal ends. Instead of looking alone to the interests of the stockholders and creditors of the company, their rights were not only disregarded, but deliberately sacrificed, that profit might result to him.

It was perfectly plain that the interest accruing on the first and second mortgage bonds must be paid as it matured, or terms made with the holders of those bonds. The holders of the third mortgage bonds would naturally hesitate to resort to their legal remedies so long as the income of the company was faithfully applied to keeping the road in repair, and to the payment of preferred debts. The cities of Covington and Cincinnati, and the county of Pendleton, had no option, so far as their bonds were concerned, except to pay them and the interest as it accrued, if the company failed to do so. The holders of the income bonds had no security at all except the earnings of the road, and hence it was their interest to keep it in the hands of the company. Such being the situation of affairs, the refusal of the directors to pay the interest on the first and second mortgage bonds, and the diversion of the company's funds to the purchase of depot grounds, and to the making of repairs and improvements on the road, which might have been readily dispensed with, evidences an intention, on the part of those responsible for the line of

conduct pursued, to bring the road to sale. In 1858, the prospect for an increase of business, and consequently of increased receipts, was by no means discouraging. There had been a steady increase in earnings during the years 1856, 1857, and 1858. In the last-named year, the road, after the payment of all running expenses, earned \$198,316.80. Twenty-five per centum of this amount would have satisfied the interest falling due on the first and second mortgage bonds, on the 1st of September, 1858. It was in the payment of this interest, which was less than forty-eight thousand dollars, that default was made. An agreement to pay it by the 1st of January, 1859, which might have been made and performed, would have prevented the institution of Winslow's suit. This the directory not only declined to do, but after suit had been commenced, they, fully apprised of the inevitable result of their action, deliberately used the company's moneys in the purchase of extensive depot grounds, and in making upon the road "*the best and most valuable*" improvements.

The money used for these purposes, and in the payment of debts that were not pressing, and the collection of which the holders could not press without endangering their ultimate loss, would have more than paid off the accrued interest on these bonds, and redeemed the forfeiture on Winslow's mortgage. The whole amount of interest due and unpaid on the first and second mortgage bonds, at the time judgment was rendered in favor of Winslow, was less than \$100,000. In the year 1859, before the road was taken out of the hands of the company, its net earnings were \$227,734.77. Out of this sum, the interest unpaid at the time the mortgages were foreclosed, as well as that falling due on the 1st of September, 1859, might have been paid, and fully \$100,000 devoted to improving and repairing the road, and to the payment of the floating debt of the company.

The judgment of foreclosure and the sale of the road were the direct and necessary consequences of this misapplication of the company's funds. Bowler was not only an adviser and advocate of the non-payment of the interest accrued and accruing on the company's bonds (except of the third mortgage, in which he was largely interested), and the expenditure of its means in rendering the road more valuable to the purchaser at

the decretal sale; but in the month of June, 1859, while it was still possible to redeem the forfeiture, and leave Winslow without a cause of action, he was, as a party to Winslow's suit, urging a speedy sale of the road, and resisting a postponement of the trial of the cause.

His conduct in the premises can not be defended upon the idea that his action as a director was approved by his co-directors. It is not denied that he exercised over them a controlling influence. Besides this, when we consider that he purchased the road when sold, through the agency of a co-director, W. H. Gedge; that the President of the company, John T. Levis, and two of the directors, W. H. Gedge and B. W. Foley, became sureties for him, on the bonds he was required to give, and that he made this President the Superintendent of the road immediately upon receiving possession of it; and that Levis and Gedge became partners with him in the joint stock association formed in 1861, we may readily infer why it was that he was able to dictate a line of policy resulting so profitably to himself.

In March, 1859, Lucius Desha, the director for Harrison County, resigned. A suitable person applied for the place thus made vacant; but the Directory, Bowler, Levis, Gedge, and Foley, being present, and constituting a majority of the members in the meeting, resolved that there was "no urgent, indispensable necessity for the election of a director for Harrison County, before the next regular meeting of the Board." The vacancy was never filled; and when Levis, Gedge, and Foley became parties to Bowler's purchase, the company was left without a Directory.

There is no doctrine better settled, nor more universally recognized, than that an agent or trustee can not rightfully place himself in a position creating in his own bosom a conflict between self-interest and the duty he owes to those for whom he acts. Generally, such persons will not be allowed to purchase and make profit out of the estate of those toward whom they occupy a confidential relation. A purchase made by the trustee, when the *cestui que trust* is *sui juris*, and after the relation is understood to be dissolved, will not be upheld, except where "there is a clear contract, ascertained to be such after a zealous and scrupulous examination of all the circumstances; and it is

clear that the *cestui que trust intended that the trustee should buy, and there is no fraud, no concealment, and no advantage taken by him as trustee,*" *Coles v. Trecothick*, 9 Vesey, 234. Testing Bowler's rights by this rule, and applying the doctrine announced to the facts of this case, we perceive no ground upon which a court of equity can rest a denial to appellant of the relief it seeks.

The company has not lost its right to demand relief because of acquiescence in Bowler's purchase and possession. In no instance has it manifested an intention to abandon its claim to the property. Its failure to accept the proposition, made through the columns of a newspaper, at the stockholders' meeting of December 22, 1859, does not prejudice its rights, nor raise the presumption of acquiescence on its part. To this proposition, conditions were attached to which the company was neither legally nor morally bound to accede. It had the right to have its property delivered to it by placing Bowler in *statu quo*. He could not take advantage of the possession he had wrongfully obtained to compel the company to satisfy debts then due and payable, much less to indemnify him against loss on account of the investments he had made in its inferior securities. It was unreasonable and unconscientious in him to require, in addition to being relieved from all expense and liability incurred in making the purchase, that he should then be paid the amount, with interest, he had invested in these securities. They were not then due, and, except for the unpaid interest, he had no right of action against the corporation. The distinction between this and the case of *Roach v. Hudson*, 8 Bush, 410, is, that in the one the party holding under an implied trust offered in good faith to execute the trust, asking only to have returned to him the money he had actually expended; and in the other, the trustee demanded the immediate settlement of claims disconnected from, and not growing out of, the trust.

In addition to this fact, we can not regard Bowler's proposition as having been made in good faith. He knew that, for the time, it was impossible for the company to comply with it. Its Directory had been disorganized by the open defection of himself, Levis, Gedge, and Foley. Every cent of its available funds had been paid out under the orders of Bowler and his associates,

and its only source of revenue was then in the hands of the faithless fiduciary who was dictating the terms upon which he would repair the great wrong perpetrated by him upon those who had trusted him. The refusal to entertain this proposition, and the failure to sue until nearly the requisite length of time to bar its action had elapsed, present no obstacle to the interposition of a court of equity in behalf of the company. At most, it but remained inactive when it might have prosecuted its claim for relief. But merely remaining passive does not deprive a party of the right to seek relief, unless, in addition thereto, he does some act to induce or encourage others to expend their money, or to alter their condition, and thereby renders it unconscientious for him to enforce his rights. No such act upon the part of the company is shown in this case.

We do not regard the question of the solvency of the company, at the time of the Bowler purchase of the road, as a matter of very great consequence. The fact that the Judge of the Fayette Circuit Court regarded it as insolvent, doubtless induced him to sell it instead of leasing or placing it in the hands of a receiver. But, notwithstanding that conviction upon the part of that judge, if the insolvent company had bid off the road at the whole amount of the debts embraced by his judgment, and made the necessary deposits and gave the required securities for the performance of the judgment, its bid would certainly have been accepted. As a matter of law, the bid of a person representing the company and holding under his bid for its benefit, was accepted. The company demands to be allowed the benefit of its agent's purchase, and it is not for him to say that his principal was and is insolvent, and, therefore, will not be able to hold the property against its creditors.

It is the duty of the company, out of the earnings of the road, to pay all its debts. If this can not be done, then the members of the corporation, the holders of stock, are morally bound to take the necessary steps to regain the possession of the road, that it may be again sold for the benefit of those of the creditors of the corporation whose debts are not provided for, it being reasonably certain that a resale will result beneficially to them. We will not in this case inquire whether or not appellees

hold the property for a resale. It is true that generally when a trustee purchases trust property, he holds for a resale; but this rule is not universal. *Longest's adm'r. v. Tyler's ex'r.*, 1 Duvall, 192. Whatever the rule in this case may be, it can not enlarge the rights of the appellees. They can not demand that the property shall be again sold. When they are divested of title, and surrender the possession of the property to its owner, the company, its unpaid creditors may, if they choose, in the proper court, ask a resale; but it is not necessary, in the adjudication of the questions involved in this cause, that we shall anticipate such action upon the part of these unpaid creditors.

An inspection of the conveyance from Bowler and wife to Ernst and Keith, shows that none of the appellees are purchasers without notice of appellants' claim. After providing that the property shall be held primarily for the payment of the debts embraced by Bowler's bid, and reciting that it was expressly understood that said property was conveyed subject to the lien reserved by the judgment of the Fayette Court, and that the trustees were always to provide for and protect that lien, the deed further provides: "That should said railroad be taken from said trustees, or said Bowler, *by any other claim* in law or in equity, and said joint stock association be deprived of the use, occupation, and profits thereof, by any claim other than the bonded debts," that Bowler shall refund to his associates the amounts paid by them respectively, in the manner and form, and out of a certain fund therein set out and described. As it was a matter of public notoriety that Bowler's claim was not recognized by the company, and that, for some considerable time after his purchase, the possibility of a suit, by the company, to recover possession of the road, was canvassed in the public prints, we have no difficulty in understanding why it was that those purchasing from Bowler should require this covenant of special warranty to be inserted in the deed. They had reason to believe that the company had not abandoned its claim to the road, and they knew that Bowler was a director of the company when he bought it at the decretal sale. They had such notice of the infirmity of their vendor's title as put them on inquiry; and hence they contracted for indemnity against possible loss by reason of such infirmity.

For the reasons stated, it is considered that the judgment of the Kenton Circuit Court, dismissing appellant's petition, be reversed. The cause is remanded for a settlement of the accounts between the parties upon the basis prescribed in the mandate of this court, and then for a judgment as to the ownership of the property in litigation, and the right of the appellant to possession and control of said property, conformable to the views expressed in this opinion.

MANDATE.

In pursuance of the foregoing OPINION, on the 2d of June, 1873, the following mandate was filed in the cause by the Judges:

Appellant is to be credited:

1. With any moneys arising out of the earnings of the road while in the custody of the officers of the Fayette Circuit Court, before possession was delivered to Bowler, and which may have been paid to him, or paid out for his benefit. Upon any such amount legal interest will be allowed from the date of payment.

2. With the gross earnings of the road from the time it was placed in Bowler's possession. Legal interest will be allowed from the end of each year upon the amount earned in each year; and, for the purpose of computing this interest, it will be proper to adopt the date fixed by Bowler and his successors as the end of their current fiscal year.

Appellees are to be credited:

1. With all sums of money paid on the debts of the company under and pursuant to the judgment of the Fayette Circuit Court, and in satisfaction of the amount bid by Bowler at the decretal sale. Upon these sums interest will be computed from the date of payment.

2. With all sums of money expended by them in keeping the road in good repair, and in keeping up the rolling-stock and machinery. Also, for proper improvements to the road, including fills, bridges, and depot-houses, and in the purchase or acquisition of additional rolling-stock, and in the purchase of necessary depot-grounds. Upon the sums expended, interest will be computed from the end of the current fiscal year within which the expenditure may have been made.

3. With the actual running expenses of the road, including reasonable compensation to the Directory or Board of Control; also, to the Superintendent and other necessary and proper officers and *employés*. Upon the sums so expended, interest will be computed from the end of each current fiscal year.

In making up these accounts, they should be separately stated: 1. As to the time Bowler held and run the road for himself. 2. As to the time it was held and run by the first joint-stock association. 3. As to the time it has been held and run by the present association.

But unless these parties, or their representatives, who are all appellees, agree as to the facts necessary to enable the court to state the accounts as last indicated, appellant is not to be delayed by any litigation that may arise between them, but shall have a settlement in the manner first pointed out, without any unnecessary delay.

If it shall be found that there is a balance due to appellees, they will be entitled to a judgment against the company for the amount thereof, and, until such judgment is satisfied, appellant will not be allowed to proceed further with its suit. The Chancellor will also put it upon terms, either to pay off and satisfy such judgment within one year after its rendition, or to suffer a dismissal of its petition.

If, upon the other hand, it shall be found that there is a balance due to the company, judgment shall be rendered in its favor against the appellees, conforming to the separate statement of accounts allowed, if the same can be made. If not, then a judgment in gross against all the appellees personally liable for such balance (a).

(a) By the provisions of the act to amend section 900 of the Civil Code of Kentucky, approved March 6, 1868, "no mandate shall issue, or decision become final," until after the expiration of thirty judicial days from the time the decision was rendered. The filing of a petition for rehearing has the effect to suspend the taking effect of the mandate until the petition is passed upon. If such petition is filed within the time granted by the Court, the issuing of the mandate, or its becoming final, is accordingly suspended until the same is acted upon by the Court.

On the application of the appellees to the Court of Appeals, time for the filing of a petition for rehearing was extended to the 1st day of August, 1873.

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1. OPENING ACCOUNTS.—The bill stated that an account had been made out, showing that a sum was due plaintiff, and that the defendant set up that account, and the payment of the balance, as a final settlement. The bill charged the contrary, and that much more was due plaintiff, as would appear if certain accounts were rendered. A deed of release had been executed by the plaintiff, at the time of the payment of the balance in question. As this deed of release acknowledged the receipt of certain sums, it could not be wholly set aside; but the court did not deprive the plaintiff of his right to the accounts which he sought. *Wedderburn v. Wedderburn*, 18 Eng. Ch. 40, 348
2. LAPSE OF TIME.—Between *cestui que trust* and trustee no lapse of time will preclude the account in a case in which the relation of trustee and *cestui que trust* continues—the transactions between them are not closed, and the delay of the claim is attributable to the trustee not having given to his *cestui que trust* information to which he was entitled, and accounted with him in such manner as he ought.—*Ib.*
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1. The rejection of a proposition made through the columns of a newspaper, to which conditions are attached which the beneficiary is neither legally nor morally bound to accept, does not raise the presumption of acquiescence. Under the circumstances in this case, the corporation had the right to have its property delivered to it by placing the holder in *statu quo*. *Cov. & Lex. Railroad Co. v. Bowler, et als.*, 467
 2. The offer to restore in this case distinguished from that in *Roach v. Hudson*, 8 Bush, 410, (reproduced herein, pages 418, 550,) wherein the offer of restoration was held to be reasonable, and the refusal to accept the same held binding.—*Ib.*
 3. Merely remaining passive does not deprive a party of the right to seek relief, unless, in addition thereto, he does some act to induce or encourage others to expend their money or alter their condition, and thereby renders it unconscientious for him to enforce his claim. "No such act upon the part of the company is shown in this case."—*Ib.*
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ADMINISTRATOR'S PURCHASE OF TRUST ESTATE:

1. If the administrator makes a sale of land belonging to the estate, under an order of court procured by him, and becomes the purchaser through another person, who takes the legal title in trust for the administrator, and afterward conveys it to him, the heir retains such an equitable interest in the land as is assignable, and the assignee may maintain an action against the administrator to enforce a trust. *Boyd v. Blankman*, 29 California, 19, 147
2. **HEIR'S EQUITY.**—In such case, the heir retains the equitable title, and his deed conveys such title, while the legal title is vested in the administrator who holds it in trust, and the deed of the heir conveys the equitable title, and is evidence of his intention to disaffirm the sale.—*Ib.*
3. **THE TRUST BINDS THE LAND.**—There are strong reasons for holding that the relation of trustee and *cestui que trust* is not by the fact of the sale shifted from the land to the proceeds of the sale, but that the administrator remains a trustee as to the land until the heir affirms the sale.—*Ib.*
4. **THE SALE IS VOIDABLE.**—The sale is not void, but only voidable at the election of the heirs or other persons interested in the estate, who may have the sale set aside and the administrator declared a trustee. If the court, in a matter where it has jurisdiction, makes an order upon insufficient evidence, or contrary to the evidence, the order can not be attacked in a collateral proceeding.—*Ib.*
5. **COLLATERAL SUIT.**—If an administrator procures an order of court for the sale of real estate to pay a debt which he had previously paid with funds of the estate, it is not a fraud which will enable the order to be attacked in a collateral proceeding. An order to sell all the real estate of an intestate to pay debts, when the sale of a small portion would have been sufficient, can not be set aside in a collateral proceeding. 148

To the same point, see EXECUTOR'S PURCHASE OF TRUST ESTATE.

ADMINISTRATOR—WHEN NOT CHARGEABLE AS TRUSTEE:

1. The law is well settled, that a person occupying the position of a fiduciary can not be a purchaser of the trust property, even in the absence of any ground for the presumption of actual fraud. *Sharkley v. Taylor*, 1 Bond's Ct. Ct. 142, 373
2. Where three persons were administrators of an insolvent estate, and had obtained an order for sale of defendant's land to pay debts, and at the sale a note was taken for a part of the purchase-money, payable to the administrators, upon which suit was brought, judgment obtained, the property offered for sale, and one of the administrators became the purchaser: *Held*, that such administrator did not occupy a fiduciary relation, and that the sheriff's deed vested a good title to him.—*Ib.*

ADMINISTRATOR—WHEN NOT CHARGEABLE AS TRUSTEE—*Continued.*

3. If the purchaser could be viewed as a trustee, the creditors of the insolvent decedent, and not the heirs, would be the proper persons to impeach the sale.—*Ib.*

On settlement of his accounts, can not be charged with profit on his purchase of trust estate, n.377

ADVERSE POSSESSION:

Causes statute of limitations to run, n.249

To the same point, see TRUSTEE UNDER WILL, 4; AGENT, 7. See POSSESSION.

AGENTS:

Are trustees, n.48, 49

Doing equity are entitled to equity, n.189

1. CONVERSION OF TRUST FUND.—In cases of trust, where the trustee has violated his trust by an illegal conversion of the trust property, the *cestui que trust* has a right to follow the property into whosoever hands he may find it, not being a *bona fide* purchaser for a valuable consideration, without notice. *Oliver v. Piatt*, 3 How. 333, 18
2. Where a trustee has, in violation of his trust, invested the trust property, or its proceeds, in any other property, the *cestui que trust* has his option, either to hold the substituted property liable to the original trust, or to hold the trustee himself personally liable. The option belongs to the *cestui que trust* alone, and not the trustee.—*Ib.*
3. OPTION OF BENEFICIARY.—If the trustee, after such an unlawful conversion of the trust property, should repurchase it, the *cestui que trust* may, at his option, either hold the original property subject to the trust, or take the substituted property. The trustee, in such case, has no right to insist that the trust shall, upon the repurchase, attach exclusively to the original trust property.—*Ib.*
4. Where the trust property has been unlawfully invested, with other funds of the trustee in other property, the latter, in the hands of the trustee, is chargeable *pro tanto* to the amount or value of the original trust property, 19
5. NOTICE.—What constitutes notice of a trust?—*Ib.*
6. An agent, employed by a trustee in the management of the trust property, and who thereby acquires a knowledge of the trust, is, if he afterward becomes possessed of the trust property, bound by the trust, in the same manner as the trustee.—*Ib.*
7. LAPSE OF TIME.—Lapse of time is no bar to a subsisting trust in real property. The bar does not begin to run until knowledge of some overt act of an adverse claim set up by the trustee is brought home to the *cestui que trust*. The lapse of any period less than twenty years will not bar in equity, although he may have been guilty of some negligence, where the suit is against his trustee, who is guilty of the breach of trust, or others claiming under him with notice.—*Ib.*
8. There can be no disseisin of a trust, though the exercise of an adverse possession for a great length of time may in equity bar or extinguish it. *Baker v. Whiting*, 3 Sumner, 475, 136
9. A purchase by an agent will be deemed, by a court of equity, a purchase for his principals, unless the agent has openly and notoriously, and with full notice to his principals, discharged himself from his agency.—*Ib.*

AGENTS—*Continued.*

10. A tenant in common can not, without the consent of his co-tenants, grant permits to persons to go on the premises owned in common, and to cut down timber thereon for their own use, for a compensation.—*Ib.*
11. All acts done by one tenant in common, are to be done for the interest of all the co-tenants, and in conformity to their rights, until an adverse claim is notoriously set up.—*Ib.*
12. ACCOUNT.—Stimpson gave a deed of release of his interest, as a tenant in common, to Baker. At the time of this conveyance, Whiting was in possession and seized of the premises, claiming them in his own right, by virtue of a purchase under a tax sale. Whiting was one of the tenants in common, and the agent of Stimpson and the other proprietors. *Held*, that the purchase of Whiting must be deemed a trust for the benefit of Stimpson and Baker, to the extent of their interests; that he ought to be decreed to convey the legal title to the premises, after being satisfied in all just claims which he had against them for taxes, the purchase in the tax sale, his expenditures and improvements, and also for his services as agent, deducting all sums of money received.—*Ib.*
13. In equity, length of time is no bar to a trust clearly established; provided no circumstances exist to raise a presumption from lapse of time of an extinguishment of the trust, and no open denial or repudiation of the trust is brought home to the knowledge of the parties in interest, which requires them to act as upon an adverse title, 137
14. When a person purchases property as the agent of another, though he may have the deed or contract of sale made out in his own name, the principal acquires an equitable title thereto, subject to all the incidents attaching to such an estate, and the agent holds it in trust for the principal. *Follansbe v. Kilbreth*, 17 Illinois, 522, 180
15. ELECTION.—An equitable title derived under such circumstances, may be divested out of the *cestui que trust* otherwise than by alienation, before the trust is actually performed, as was decided to have been done in this case.—*Ib.*
16. If a *cestui que trust* discovers facts which would give him a right to repudiate the acts of his trustee, and has investigated them, or had a reasonable time to do so, he is bound to declare whether he will avail himself of the right or not, and can not lie by in a position to affirm the bargain, if a profitable one, and repudiate it if a losing one.—*Ib.*
17. Where a *cestui que trust*, having a right to repudiate a transaction, laid by for three years, and suffered his trustee to go on and make payments for the property: *Held*, he was not entitled to relief, 181
18. A trust was created by purchasing land on execution, upon a verbal agreement between the owner and the purchaser that the purchaser would hold the land as security for the money advanced and interest, and that the owner should have the right to redeem. *Williams v. Williams*, 8 Bush, 241, 407
19. Acquiring and holding the legal title to land by purchasing at execution and otherwise, under a verbal agreement, that the land and title should be held as a security for moneys advanced and interest, and that the owner should have the right to redeem the land, created a trust.—*Ib.*
20. The purchaser held the legal title to the land about fifteen years before the suit was brought in which the trust was established. See opinion, for a full statement of the facts and evidence establishing a trust.—*Ib.*

AGENTS—*Continued.*

21. Time for redeeming land sold under execution extended beyond one year by purchaser, he is entitled to ten per cent interest for one year only. In such case, interest should be calculated at ten per cent per annum for one year, and, after adding that to the principal, interest thereafter at the rate of six per cent, 408
- See TRUSTEE—EX MALEFICIO; ESTOPPEL, 5.

ATTORNEY:

1. The creditor in an execution may claim the benefit of a purchase made by his attorney, especially if the whole debt is not paid. But he must assert his right in a reasonable time. *Wade v. Pettibone*, 11 Ohio, 57, . . . 190
 2. FRAUD BY ATTORNEY OF BOTH PARTIES.—Where money is intrusted by A to his solicitor for investment, but without any particular investment being then in contemplation, and it is allowed to remain in the hands of the solicitor, the amount becomes a debt due from the solicitor to A. If the solicitor afterward misapplies the money, and to cover his fraud obtains from another client, B, upon a false representation, a transfer of B's equitable interest under a previously executed mortgage, no money of A being then paid to B, the transfer thus obtained may, on B's discovering the fraud, be set aside in equity; for no money of A having been received by B at the time the transfer was executed, no interest passed to A by its execution. *Wall v. Cockerell*, 10 House of Lords Cases, 229, . . . 388
 3. What circumstances may constitute acquiescence of B in the solicitor's fraud, and deprive him of the right to relief.—*Ib.*
- Are trustees, n.49
- Sales at auction are not exempt from equitable rule, n.179
- To the same point, see *Davoue v. Fanning*, 1.
- See CONFIRMATION; ELECTION.

BANKRUPTS:

- Commissioners and Assignees in bankruptcy are trustees, n.19

BEQUESTS:

- See CHARITABLE BEQUESTS.

BROKER:

- See CLERK, 1, 3.

CESTUI QUE TRUST:

- His relation to trustee. See AGENTS, 15, 16, 17.
- Disaffirmance of purchase by trustee. See ADMINISTRATORS' PURCHASE OF TRUST ESTATE, 5.
1. The old cases with regard to maintenance and champerty go further than would now be sustained in courts of equity. A *cestui que trust* may lawfully dispose of his trust estate, notwithstanding his title is contested by the trustee. *Baker v. Whiting*, 3 Sumner, 475, 136
- To the same point, see ADMINISTRATORS' PURCHASE OF TRUST ESTATE, 1.
- When he will be compelled to elect, n.132
- See AGENTS, 1, 2, 3, 7. See CONFIRMATION BY CESTUI QUE TRUST, 1, 2.

CHAMPERTY:

- See CESTUI QUE TRUST, 1.

CHARITABLE BEQUESTS:

- Power of Corporation to take, 210

CHARITABLE BEQUESTS—*Continued.*

- Are to receive the most liberal construction, n.213
 Where not void for uncertainty, n.344
 See CORPORATION, 4, 5, 11.

1. A bequest for charitable uses, where the objects are sufficiently defined, and the person designated as trustee acquires a capacity to hold by subsequent act of incorporation, takes effect as an executory devise. *The M'Intire Will Case*, 9 Ohio, 203, 206
2. CORPORATION.—The corporation of the city of Philadelphia has power, under its charter, to take real and personal estate by deed, and also by devise. *Vidal v. Girard (Girard Will Case)*, 2 How. 127, 214
3. HOLDING TRUST PROPERTY.—Where a corporation has this power, it may also take and hold property in trust in the same manner and to the same extent that a private person may do. If the trust be repugnant to the proper purpose for which the corporation was created, it may not be compellable to execute it, but the trust (if otherwise unexceptionable) will not be void, and a court of equity will appoint a new trustee. Neither is there any positive objection to a corporation taking property upon a trust not strictly within the scope of the direct purposes of its institution, but collateral to them.—*Ib.*
4. WHAT POWERS INCLUDE CHARITIES.—Under the general power "for the suppression of vice and immorality, the advancement of the public health and order, and the promotion of trade, industry, and happiness," the corporation may execute any trust germane to those objects. The charter of the city invests the corporation with power to take property upon trust for charitable purposes, which are not otherwise obnoxious to legal animadversion.—*Ib.*
5. LEGISLATIVE ESTOPPEL.—The two acts of March and April, 1832, passed by the Legislature, are a legislative interpretation of the charter of Philadelphia, and would estop the Legislature from contesting the competency of the corporation to take the property and execute the trust.—*Ib.*
6. CAN NOT FAIL FOR WANT OF TRUSTEE.—If the trusts were in themselves valid, but the corporation incompetent to execute them, the heirs of the deviser could not take advantage of such inability. It could only be done by the State in its sovereign capacity.—*Ib.*
7. WHAT ARE CHARITIES.—The trusts mentioned in the will of Stephen Girard are charitable uses, in a judicial sense. Donations for the establishment of colleges, schools, and seminaries of learning, and especially such as are for the education of orphans and poor scholars, are charities in the sense of the common law.—*Ib.*
8. CHANCERY SUSTAINS CHARITIES WITHOUT STATUTORY AID.—The decision of the Supreme Court of Pennsylvania, in the case of *Zimmerman v. Andres*, recognized and confirmed, viz: "That the conservative provisions of the statute of 43 Elizabeth, chap. 4, have been in force in Pennsylvania, by common usage and constitutional recognition, and not only these, but the more extensive range of charitable uses which chancery supported before the statute and beyond it, 215
9. The present case distinguished from the case in 4 Wheaton, 1, upon two grounds, viz: 1. That the case in Wheaton arose under the law of Virginia, in which the statute of 43 Elizabeth, chap. 4, had been abolished. 2. That the donees were an unincorporated association which had no legal capacity

CHARITABLE BEQUESTS—*Continued.*

to take and hold the donation, and the beneficiaries were also uncertain and indefinite.—*Ib.*

10. JURISDICTION OF CHARITIES.—The decisions and publication of the Record Commissioners, in England, examined as to the jurisdiction of chancery over charitable devises anterior to the statute of 43 Elizabeth. This part of the common law was in force in Pennsylvania, although no court having equity powers existed capable of enforcing such trusts.—*Ib.*
11. WHAT DEVISES ARE NOT CONTRARY TO CHRISTIANITY.—The exclusion of all ecclesiastics, missionaries, and ministers of any sort from holding or exercising any station or duty in a college, or even visiting the same, or the limitation of the instruction to be given to the scholars to pure morality, general benevolence, a love of truth, sobriety, and industry, are not so derogatory and hostile to the Christian religion as to make a devise for the foundation of such a college void, according to the constitution and laws of Pennsylvania.—*Ib.*
12. RIGHT OF HEIRS TO QUESTION BEQUESTS.—Where a testator devises the income of property in trust primarily for one object, and if the income is greater than the object needs, the surplus to others, a bill in the nature of a bill *quia timit*, and in anticipation of an incapacity in the trusts to be executed hereafter, and when a surplus arises (there being no surplus, nor the prospect of any), will not lie by heirs at law (supposing them otherwise entitled, which here they were decided not to be), to have this surplus appropriated to them on the ground of the secondary trusts having, subsequently to the testator's death, become incapable of execution. *Girard v. Philadelphia*, 7 Wallace, 1 (*Girard Will Case*, No. 2), 238
13. IDENTITY OF MUNICIPAL CORPORATION.—Neither the identity of a municipal corporation, nor its right to hold property devised to it, is destroyed by a change of name, an enlargement of its area, or an increase in the number of its corporators. And these are changes which the Legislature has power to make.—*Ib.*
14. RES ADJUDICATA.—Under the will of Stephen Girard [for the terms of which see *Vidal v. Girard*, herein, page 214], the whole final residuary of his estate was left to the old city of Philadelphia in trust to apply the income, 1. For the maintenance and improvement of the college as a primary object; and after that, 2. To improve its police; 3. To improve the city property and the appearance of the city, and to diminish the burden of taxation, the court having declared that so long as any portion of the income should be found necessary for improvement and maintenance of the college, the second and third objects could claim nothing, and the whole income being, in fact, necessary for the college. *Held*, 1. That no question arose as to whether the new city should apply the surplus under the trusts for the secondary objects to the benefit of the new city, or to that portion of it alone embraced in the limits of the old one; 2. That whether or not the trusts being, as was decided in *Vidal v. Girard* [page 214], in themselves valid, Girard's heirs could not contest the right of the city to take the property or to execute the trusts, this right belonging to the State alone as *parens patrie*.—*Ib.*
15. TRUSTS FOR CHARITIES.—By deeds executed in 1704, Lady Hewley conveyed estates, upon trust to pay out of the rents such sums, yearly or otherwise, to such poor and godly preachers for the time being of Christ's holy

CHARITABLE BEQUESTS—*Continued.*

- Gospel, and to such poor and godly widows for the time being of poor and godly preachers of Christ's holy Gospel, as the trustees for the time being should think fit, etc., and to dispose of the remainder of the said rents in relieving such godly persons in distress, being fit objects of her and the trustees' charity, as the trustees for the time being should think fit; and she directed, that when any one of the trustees should die, the survivors should elect in his place such a person as they in their judgments and consciences should think fit to be a trustee. *Shore v. Wilson (Lady Hewley's Trusts)*, 9 Clarke & Fennelly, 355, 450
16. PROTESTANT DISSENTERS.—By other deeds executed in 1707, Lady Hewley conveyed other estates to the same trustees, partly for the support of poor old people in an alms-house, for the management of which she appointed other trustees; and, after directing that the trustees should observe the rules which she should leave for the selection and government of the poor people therein, she ordered the residue to be applied upon trusts, which were the same as those contained in the deeds of 1704. By the rules left by her, she ordered that none be admitted but such as should be poor and piously disposed, and of the Protestant religion, and able to repeat by heart the Lord's Prayer, the Creed, the Ten Commandments, and Bowles's Catechism, 451
17. UNITARIAN.—At the dates of the deeds, all religious sects tolerated by law believed in the Trinity; but in the course of time the estates became vested in trustees of whom the majority were Unitarians, and they applied the rents for the benefit of Unitarians; and that sect became tolerated by law. *Held*, that neither Unitarians nor members of the Church of England, but Protestant Dissenters only, are entitled to the benefit of the charities, and that all the trustees were properly removed, as all concurred in the misapplication of the charity.—*Ib.*
18. EXTRINSIC EVIDENCE IN CONSTRUCTION OF DEEDS.—*Held*, that for the purpose of determining the objects of Lady Hewley's charity, under the terms, "godly preachers of Christ's holy Gospel," "godly persons," and the other descriptions contained in her deeds, extrinsic evidence is admissible to show the existence of a religious party by whom that phraseology was used, and the manner in which it was used, and that she was a member of that party.—*Ib.*
19. A decree declaring that certain persons are not entitled thereto, is not defective for not also declaring who are entitled.—*Ib.*

CHURCH PROPERTY:

1. CHANGE OF TRUST.—A court of equity has jurisdiction to decree a sale of property held in trust for charitable or religious purposes when, in its opinion, the objects of the trust would be more effectually carried out by such sale. *Wensinger v. Allemany*, 40 California, 288, 345
2. PRACTICE—UNDER WHAT TERMS IT WILL BE MADE.—It should require from the trustee a bond, with sufficient security to be approved by the court, for the proper application of the proceeds of the sale to the purposes of the trust, according to the directions of the decree, and reserving the authority of the court, upon proper showing, to require additional security, or to appoint another trustee, if circumstances make it necessary.—*Ib.*

CHURCH PROPERTY—*Continued.*

3. COSTS.—The costs, including reasonable fees to counsel, are a proper charge on the trust fund, and should be allowed by the court.—*Ib.*
 4. LIABILITY OF TRUSTEES.—Title to property of religious corporations, by the Constitution of Kansas, vests in the trustees; and trustees of such corporations can not bind the corporation by their covenant, unless duly authorized. *Klopp v. Moore*, 6 Kansas, 27, 369
 5. When the trustees of a church, organized under the laws of Kansas, in making a deed of real estate, covenant to warrant and defend the same, without showing that authority had been given them by the corporation for the making of such covenant, and without expressly excluding personal liability: *Held*, that they are personally liable on such covenant.—*Ib.*
- See DEDICATION TO PUBLIC USES, 1, 2, 3.

CIVIL LAW:

- On trusts, 16, 53, 54, 55, 80
- See EXECUTORS' PURCHASE OF TRUST PROPERTY, 7, 8.

CLERK:

1. The clerk of a broker to make sale of land, who has access to the correspondence between his principal and the vendor, stands in such a relation of confidence to the latter, that if he becomes the purchaser, he is chargeable as trustee for the vendor, and must reconvey or account for the value of the land. *Gardner v. Ogden*, 22 New York, 327, 115
2. PRACTICE.—The vendor can not unite in the same action a claim against the broker for damages for having fraudulently sold the land, with a claim against the purchaser for a reconveyance or accounting.—*Ib.*
3. CLERK LIABLE.—The clerk held to reconvey so much of the land as remained in his hands, and to account for the proceeds of what he had sold, although the price paid by him upon the purchase was fair and adequate, and the broker was exonerated from fraud.—*Ib.*

COLLATERAL PROCEEDINGS:

- When sale can be impeached by. See ADMINISTRATOR'S PURCHASE OF TRUST ESTATE, 4, 5.

COMMON LAW:

- Presumptions in favor. See RESULTING TRUSTS, 13.

CONDITIONAL SALE:

- Difference between, and mortgage. See RESULTING TRUSTS, 9, 10, 11, 12.

CONFIRMATION BY CESTUI QUE TRUST:

1. Purchaser at decretal sale induced persons not to bid against him by giving assurance that, on the return of the absent owner, he would let him repurchase at the price given. *Held*, that if the absent owner, on returning home, had sought, within a reasonable time, a resale of the property to him, and the latter had refused compliance, the court would regard him as having held the property in trust, and liable to account for the difference between the price paid and the amount for which he afterward sold the property. *Roach v. Hudson*, 8 Bush, 410, 418
2. PURCHASER WAS ABSOLVED FROM THE TRUST.—After the original owner's return, the purchaser, in good faith, offered to let him repurchase the property by paying only what it had cost, including improvements, and not

CONFIRMATION BY CESTUI QUE TRUST—*Continued.*

objecting to the proposition as unfair, or variant from the assurance given when the purchase was made, the original owner declined the privilege of repurchasing: *Held*, that the original owner absolved the purchaser from any trust which devolved on him by his promise, and left the purchaser free to keep or dispose of the property as his own, without responsibility to the original owner.—*Ib.*

Subject of a binding confirmation considered, *n.*189, *n.*202

A doubted case of confirmation, *n.*202, *n.*204

Question fully considered in 4 Dessaus. S. C. R. 702, *n.*204

See *Follansbe v. Kilbreth*, 180; *Wade v. Pettibone*, 190, to the same point. Also, *Hoffman Coal Co. v. Cumberland Coal Co.*, 87, and notes 38, 72, 98.

When deed of release no confirmation. See ACCOUNTS, 1.

When election is binding. See AGENTS, 15, 16, 17.

CONTRARY TO PUBLIC POLICY:

When acts void. See CORPORATION, 9.

CONVERSION:

Effect of conversion of life estate. See TRUSTEE UNDER WILL, 1, 2, 3, 4.

CONVEYANCE:

1. A warranty, either lineal or collateral, is no bar to an heir who does not claim the property to which the warranty is attached by descent, but as a purchaser thereof. *Oliver v. Piatt*, 3 How. 333, 19

2. A deed of release, and intended to convey all the party's right and title, if it can not take effect as a release, may be construed as a sale, or other appropriate conveyance. *Baker v. Whiting*, 3 Sumner C. C. 475, . . . 136

Difference between conditional sale and mortgage. See RESULTING TRUST, 9 to 12.

Trustee bound individually. See CHURCH PROPERTY, 4, 5.

When deed absolute will be held a mortgage, *n.*425

See PURCHASE—with notice, 3.

CORPORATION:

1. PROPERTY OF CORPORATION A TRUST FUND.—As a general rule, the property of a corporation is a trust fund for the benefit of its creditors and stockholders, and they may, in all cases where it has been fraudulently or wrongfully disposed of by the directors, pursue it into the hands of purchasers with notice, and assert their lien upon it, or their claims for its value. *Goodin v. Whitewater Canal Co.*, 18 Ohio, 169, 125

2. WRONGFUL CONVERSION OF THE TRUST FUND.—A railroad company, having purchased a majority of the stock in a canal company, elected for the latter a board of directors who were in the interest of the railroad company, and with the assent of said board, appropriated the entire canal as a railroad-track, paying therefor a price which was agreed upon by the directors of the two companies, but which was far below the actual value. *Held*, that although the stockholders and creditors of the canal company can not, after the road has been completed, reclaim the property, or enjoin its use, yet they are not concluded by such agreement, as regards the price of the property, but may compel the railroad company to account for its additional value.—*Ib.*

3. RULE OF DAMAGES.—The rule of valuation in such cases is, what the

CORPORATION—Continued.

- interest of the canal company was worth, not for canal purposes merely, or for any other particular use, but what it was worth generally, for any and all uses for which it might be suitable.—*Ib.*
4. STOCKHOLDERS.—A corporation being a defendant to a suit in equity, which seeks to have it declared null, the holders of stock in it are not proper parties to defend the suit. In such a case, the holders of the stock claiming that if the corporation is annulled, they have equitable interests in the property, may be admitted as parties defendants to protect their interests. *Washington, Alexandria and Georgetown Railroad Co. v. Alexandria and Washington Railroad Co.*, 19 Grattan, 592, 268
5. WHEN SUIT CAN BE REMOVED TO U. S. COURT.—The plaintiff and defendant corporations being of the same State, the owners of the stock, though non-residents, are not entitled to have the cause removed to the United States Court to have the question of the validity of the corporation decided, 269
6. NEW TRUSTEE—WHEN APPOINTMENT ILLEGAL.—A railroad company make a deed on their property to secure certain bonds; and it provides that if the trustee becomes incapable of acting, any court of record of Alexandria County, upon the application of three-fifths of the holders of the bonds, upon notice to the president or any director of the company, may appoint another trustee. The trustee, president, and directors go into the enemy's lines, and remain during the war. An order substituting another person as trustee, without notice, is null and void; and a sale made by such substituted trustee is utterly null.—*Ib.*
7. TRUSTEE CAN NOT SELL TO HIMSELF.—A trustee in a deed to secure debts, who is the attorney in fact and law of the creditor, can not make a valid sale at auction of the property to himself.—*Ib.*
8. INCUMBRANCES MUST BE FIXED BEFORE THE SALE.—Where there are various incumbrances on property, and the priorities are not ascertained, a sale by a trustee under one of the deeds is improper.—*Ib.*
9. PUBLIC POLICY—ESTOPPEL.—An agreement was made between the Pacific Mail Steamship Company and the Accessory Transit Company, by which the former company was to pay to the latter a certain sum per trip or per month, so long as the boats of the Pacific Company should run without opposition. *Held*, that a court would not enforce it against the delinquent party. Yet, that the rule did not apply to an action by one of the principals in such a contract against its agent who had received money thereon. *Murray v. Vanderbilt*, 39 Barbour, 440, 103
10. WHERE PRESIDENT IS RELEASED FROM HIS TRUST.—After a corporation has virtually ceased to exist, and for all purposes of business and for promoting the objects of the charter, all its powers have been taken away, its property all expended, and the company hopelessly insolvent, it is not improper for the president to enter into arrangements on his own behalf for carrying on and continuing for his own benefit the business formerly conducted by the company under an agreement not imposing any duty or obligation upon the corporation, or involving any use of its property, 104
Doubted as to the correctness of the syllabus and equity of the decision, *n.* 111
11. The being president of an insolvent corporation will not prevent one from doing what the corporation has lost all ability to do. After the company has virtually ceased to exist, and its powers have been taken away, the

CORPORATION—*Continued.*

- reason and policy of the rule prohibiting a trustee from making agreements for his own benefit ceased also, n.112
Doubted.—*Ib.*
12. FRAUDULENT SALE.—Where the president, holding a mortgage upon vessels of the corporation, given to secure advances made, and bonds of the company held by him, and authorized by the company to sell the vessels, as its agent, sold the same at private sale to his son, taking his note, payable in a year, he still keeping the control and management, and rendering no account to the purchaser for the use of them: *Held*, that such a transaction could not be upheld, and ordered to be set aside, and the agent directed to account to the company for the proceeds, when subsequently sold by him.—*Ib.*
13. PLACING SHARES AT DISPOSAL OF DIRECTORS.—A general meeting of a railway company placed shares in a projected extension at the disposal of the directors: *Held*, that the disposal was merely as trustees for the company; and the chairman (who exercised uncontrolled authority in the company), having sold part of such shares at a premium, was held liable to account to the company for their produce, with interest. *Held, also*, that he could not retain the profits as a remuneration for his great services, or on the ground of the acquiescence of the shareholders, to be inferred from a presumed knowledge of the share-book. *North and York Midland Railway Co. v. Hudson*, 16 Beavan, 486, 59
14. CHAIRMAN.—The chairman allotted a number of the unappropriated shares to his nominees; they were sold at a premium, and the produce received by him. *Held*, that as trustee, he was bound to the company for the profit made.—*Ib.*
15. SECRET SERVICE MONEY.—The chairman appropriated various unallotted shares to the use of various persons, whose names he did not mention, in order to secure or reward services which he declined to state, in the nature of "secret service money." *Held*, that if the defendant had applied the property of the company in a manner which would not bear the light, he must suffer the consequences.—*Ib.*
16. WHEN STOCKHOLDER CAN SUE.—The cases reviewed, on the question as to when a stockholder in a private corporation will be allowed to file a bill in his own name, on behalf of himself and all others standing in the same situation, making the corporation defendant, to compel the ministerial officers to account for breach of official duty, or misapplication of corporate funds. *Heath v. Erie Railway Co.*, 8 Blatch. C. C. 347, 430
17. REQUEST TO SUE.—Where the bill sets out *ultra vires*, in issuing shares of stock, and breaches of trust, which are frauds on the stockholders, inasmuch as such acts and breaches of trust are beyond the power of the corporation to affirm or sanction, it is not necessary that the stockholder should aver that he has applied to the corporation or its board of directors to bring the suit, and that they have refused, 431
18. NOTICE.—Where the corporation is under the control of the defendants who must be sued, and an excuse is given for the bringing of the suit by the stockholder, which is equivalent to a refusal by the directors, on request, to bring the suit, the suit may be brought by the stockholder, without showing such request and refusal.—*Ib.*
19. DISSOLUTION.—The modes by which a private corporation in our country is dissolved, are, 1. By the death of its members; 2. Surrender of its fran-

CORPORATION—*Continued.*

chises; and, 3. A judgment of forfeiture for non-use or abuse. *M'Intire Will Case*, 9 Ohio, 203, 207

20. A legislative act reciting that a corporation trustee had *lost its rights*, and authorizing a purchase for the State, of its property, is a recognition of its existence as a corporation capable of contracting.—*Ib.*

Land condemned for *quasi* public uses does not revert on change of use, *n.* 344

Where a municipal corporation can hold charitable bequests. See CHARITABLE BEQUESTS, 1, 2, 3, 4, 9.

Identity of municipal corporation. See CHARITABLE BEQUESTS, 13.

See FRAUD; FRAUDULENT SALES; STOCKHOLDERS; PRACTICE.

COSTS:

See CHURCH PROPERTY, 3.

COURTS:

Federal, follow practice in local courts. See HUSBAND AND WIFE, 4.

— OF EQUITY:

Jurisdiction. See CHARITABLE BEQUESTS, 1, 8, 10.

CREDITORS:

Property of corporation a trust fund for. See CORPORATION, 1; INSOLVENCY, 2.

DAMAGES:

Rule for computing, or for compensation. See CORPORATION, 3.

DEDICATION TO PUBLIC USES:

1. SCHOOL PROPERTY.—The village of Van Wert was laid out in 1835, and the proprietors dedicated two lots therein "for school purposes, and on which to erect school-houses." By reason of the subsequent construction of a railway, and the location of a depot in proximity to these lots, they were rendered unsuitable to be used as sites for school-houses. A petition was filed by the Board of Education of the incorporated village, praying that the court might order the lots to be sold, and the proceeds applied to the purchase of suitable school-house sites, or to the erection of school-houses on suitable grounds to be procured by the Board. Upon demurrer: *Held*, that the dedication was for a specific use, and conferred no power of alienation so as to extinguish the use. *Board of Education v. Van Wert*, 18 Ohio St. 221, 339
2. That if the use created by the dedication were abandoned, or should become impossible of execution, the premises would revert to the dedicators or their representatives, and that, without their consent, they could not be divested of their contingent right of diversion by an absolute alienation, 340
3. EXECUTION OF TRUST, *CY PRES*.—The principle upon which a trust may, under certain circumstances, be executed *cy pres*, is not applicable in such a case.—*Ib.*

Legal, although party had only an equitable title, *n.* 343

And no party in existence capable of taking the fee, *n.* 344

No provision for forfeiture, does not revert on abuse of trust.—*Ib.*

Where not void for uncertainty.—*Ib.*

Abandonment necessary to cause reversion, *n.* 344

DEDICATION TO PUBLIC USES—*Continued.*

No reversion takes place on change of use.—*Ib.* (Quere?)

Statute of limitations runs in regard to, when held adversely.—*Ib.*

See CHURCH PROPERTY, 1, 2; CORPORATION.

DIRECTOR:

1. The director of a railroad company is a trustee; and, as such, is precluded from dealing, on behalf of the company, with himself, or with a firm of which he is a partner. *Aberdeen Railway Co. v. Blaikie*, 1 M'Queen, 461, 76
2. RULE GOVERNING TRUSTEES.—It is a rule of universal application, that no trustee shall be allowed to enter into engagements in which he has, or can have, a personal interest, conflicting, or which may possibly conflict, with the interest of those whom he is bound by fiduciary duty to protect.—*Ib.*
3. FAIRNESS NO EXCEPTION.—So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of the question; for it is enough that the parties interested object.—*Ib.*
4. It may be that the terms on which a trustee has attempted to deal with the trust estate are as good as could have been obtained from any other quarter. They may even be better. But so inflexible is the rule, that no inquiry into that matter is permitted.—*Ib.*
5. It makes no difference whether the contract relates to real estate or personalty, or mercantile transactions; the disability arising, not from the subject-matter of the contract, but from the fiduciary character of the contracting party.—*Ib.*
6. SCOTCH AND ROMAN LAW.—The law of Scotland and the law of England are the same upon these points; both coming from the Roman law, itself bottomed in the plainest maxims of good sense and equity.—*Ib.*
7. EQUITY GOVERNS THE LAW.—The rules which govern fiduciary relations are equitable rules, unknown to the English courts of common law. Consequently, in a case properly determinable by those equitable rules, the decision of a court of common law, when opposed to them, must be disregarded.—*Ib.*
8. The great case of the *York Buildings Co. v. Mackenzie*, decided by the House, in 1795, under the advice of Lord THURLOW and Lord LOUGHBOROUGH, commented on.—*Ib.*
9. PURCHASE BY DIRECTOR.—A director of a corporation, at the time of the sale of part of its property was contemplated and made, and who actively participated in all the measures tending to its completion, and had full knowledge of all the circumstances attending its progress, is *not competent* to become a purchaser of such property, and the sale to him can not be upheld, if resisted by the corporation. *Hoffman Coal Co. v. Cumberland Coal Co.*, 16 Maryland, 456, 87
10. A party joining in a purchase from a corporation, with knowledge of the fact that his co-purchaser was a director of the corporation, is affected with whatever of legal disability belonged to the director by reason of that relation, 88
11. A director, having purchased lands from a corporation, united with others in forming a new corporation, he subscribing for almost all of the stock therein, and becoming one of its officers and directors, and on the next day, in pursuance of one entire plan, conveyed the same lands to the new company in payment of his subscription for said stock. *Held*, that the new

DIRECTOR—*Continued.*

- company is affected with notice of the circumstances impairing the title of the party so conveying the lands to it, and can not claim to be a *bona fide* purchaser without notice.—*Ib.*
12. Trustees can not purchase at their own sales, either directly or indirectly, and if they do, such purchase will be set aside on the proper and reasonable application of the parties interested.—*Ib.*
13. THE RULE APPLIES TO ALL FIDUCIARIES.—The same doctrine applies to purchases by persons acting in any fiduciary capacity, which imposes on them the obligation of obtaining the best terms for the vendor, or which has enabled them to acquire a knowledge of the property. A director of a corporation holds such a relation to its stockholders.—*Ib.*
14. RATIFICATION.—To render the ratification of such a sale conclusive, the principal must, at the time of the ratification, be fully aware of every material fact, and his act of ratification be an independent substantive act, founded on complete information, and he must not only be aware of the facts, but apprised of the law as to how these facts would be dealt with if brought before a court of equity.—*Ib.*
15. NOTICE.—Where a purchaser, with notice from a trustee, conveys, for a valuable consideration, to another person who has no notice of the trust, the estate will not be affected with the trust in the hands of the second purchaser.—*Ib.*
16. The same subject-matter adjudicated in *Cumberland Coal and Iron Co. v. Sherman, et al.*, 30 Barbour, 553, wherein substantially the same rulings were made, n.87
17. The subject of confirmation fully considered in the New York case, and reported at length, n.98
18. DIRECTOR CAN NOT PROTECT HIMSELF AT SACRIFICE OF THE TRUST.—A sale, far below value, of a railroad, with its franchises, rolling stock, etc., under a decree of foreclosure, set aside as fraudulent against creditors; the sale having been made under a scheme between the directors and the purchasers, by which the directors escaped liability on indorsements for the company; and the purchasers held to be trustees for the full value of the property, less a sum actually paid for a lien claim, presented as for its amount, but which they had bought at a large discount. *Drury v. Cross*, 7 Wallace, 299, 262
19. PRACTICE.—But because the full value of the property sold was not shown with sufficient certainty, the case was sent back for ascertainment of it by a master.—*Ib.*
20. TRUSTEES.—A director is a trustee for the corporation, and it being his duty to act in good faith toward his beneficiary, it is a breach of trust on his part to create any relation between himself and the trust property, whereby it becomes his interest to subserve his individual interests at the expense or to the injury of such beneficiary, or the trust property. *Cov. & Lex. R. R. Co. v. Bowler et als.*, 467
21. Where the director purchases the trust property at a judicial sale thereof, he takes and holds the property in trust for the corporation. Such person will not be allowed to purchase and make profit out of the estate of those to whom he occupies such a confidential relation.—*Ib.*
22. Where a majority of directors place themselves in a position of hostility to

DIRECTOR—Continued.

the interest of the trust, such majority incapacitate themselves for doing a valid act, whereby the corporation would be bound in regard to such interests, and deprive the minority of the legal power of acting in regard thereto.—*Ib.*

See **ESTOPPEL**, 7.

ELECTION:

See **CONFIRMATION BY CESTUI QUE TRUST**; **DIRECTOR**, 14.

When binding. See **AGENTS**, 15, 16, 17.

To take under will. See **WILL**, 1.

EQUITABLE ESTOPPEL:

See **ESTOPPEL**.

EQUITABLE TITLE:

1. **MINORS.**—Where property, in which minor heirs have an equitable interest, is being improved by the party claiming the legal title, they are not bound to give notice, and would not be estopped because of their failure to do so; for they are not capable of stopping themselves, simply by failure to assert title. *Kane County v. Herrington*, 50 Illinois, 232, 158
2. **ESTOPPEL.**—If persons who have an equitable claim to real estate, assent to, and acquiesce in, acts performed in relation to such estate, by one holding the same in trust for the equitable claimants, such acts of the trustee being inconsistent with their equitable rights, they, by such assent and acquiescence, will be estopped from afterward asserting their equitable claim.—*Ib.*
3. **EQUITY ADOPTS STATUTE OF LIMITATIONS.**—The time in which equitable claim to realty should be asserted, is controlled by the analogies of the law; and if twenty years are allowed to elapse, after the statutory disability of the claimant ceases, without asserting such claim, he is placed without the pale of relief.—*Ib.*

When not an inheritable estate. See **RESULTING TRUSTS**, 8.

Can be conveyed. See **ADMINISTRATOR'S PURCHASE OF TRUST ESTATE**.

EQUITY:

- Flexibility of its rules to subserve the ends of justice, *n.*355, *n.*368
- Converts the fraudulent holder into a trustee, *ex maleficio*, *n.*368
- Bona fide* purchasers are protected, *n.*368
- Laches that will bar in law will bar in equity, *n.*38
- Can not review or reverse legal proceedings, *n.*156
- Or give relief where clear remedy at law exists, *n.*249
- Or impeach collateral proceedings. See **ADMINISTRATOR'S PURCHASE OF TRUST ESTATE**, 4, 5.
- Will restrain breaches of trust in corporations, *n.*268
- How relief is granted without disturbing legal proceedings, *n.*156
- Will protect agent in his equitable rights, *n.*189
- See **INSOLVENCY**, 1, 2.

ESTATE FOR LIFE:

- When tenant for life entitled to pay for improvements, *n.*170
- When beneficiary can recover property wrongfully pledged, *n.*387

ESTATE IN REMAINDER:

- When holder can sue for equitable waste, *n.*170

ESTOPPEL:

1. WHERE ACQUIESCENCE AMOUNTS TO ESTOPPEL.—The owner of land who stands by, without objection, and sees a public railroad constructed over it, can not, after the road is completed, or large expenditures made thereon upon the faith of his apparent acquiescence, reclaim the land, or enjoin its use by the railroad company. There can only remain to the owner a right of compensation. *Goodin v. Whitewater Canal Co.*, 18 Ohio St. 169, . 125
 2. ESTOPPEL OF TENANT.—A tenant is estopped from questioning his landlord's title, when sued for possession. But when, upon eviction under a paramount outstanding title, he has attorned to the true owner, he is not estopped from setting up the eviction, and the title under which the eviction was had, as against the claim of his lessor. *Kane County v. Herrington*, 50 Illinois, 232, 158
 3. OF HOLDER OF EQUITABLE TITLE.—When the landlord has aliened the demised premises, and sues the tenant in ejectment, the tenant may defeat the recovery by setting up the conveyance. But where a party, holding the equitable title to real estate, takes a lease from the party holding the legal title, the former is not estopped from asserting his equitable title against his lessor.—*Ib.*
 4. ACQUIESCENCE.—The regularity of the proceedings in arbitration can not be questioned, where, by long acquiescence, it has acquired such force that the parties in interest would be held to its terms. So, where a bill in chancery, to compel a conveyance, was filed February, 1864, the defendants can not set up any irregularity in the proceedings in arbitration, which occurred June, 1838, 159
 5. AGENT.—Money having been paid voluntarily to an agent for his principal, by a party who could not have been compelled to make such payment, it becomes the property of the principal in the agent's hands. Nor can he resist an action for the amount so received, on the ground that the money was paid on an illegal contract between the original parties. *Murray v. Vanderbilt*, 39 Barbour, 140, 104
 6. Not being pleaded, the question of estoppel was not litigated in this case. *Faris v. Dunn*, 7 Bush, 276, 297
 7. Where directors fail to interpose an equitable defense in a suit against the corporation, such failure can not protect one of the faithless directors in his profits realized by such breach of official duty. *Cov. & Lex. R. R. Co. v. Bowler, et als.*, 468
 8. WHERE STOCKHOLDERS ARE ESTOPPED.—Individual stockholders, being admitted as parties in a suit wherein the corporation is also a party, and filing pleadings therein, act for themselves only, and not for the corporation; and the latter is not bound or estopped by the action of the court thereon, although they may have set up the same acts as grounds for relief that are afterward relied upon by the corporation.—*Ib.*
 9. Merely remaining passive does not deprive a party of the right to seek relief, unless, in addition thereto, he does some act to induce or encourage others to expend their money or alter their condition, and thereby renders it unconscientious for him to enforce his claim. "No such act upon the part of the company is shown in this case," 467
- EQUITABLE, defined, "132
- See EQUITABLE TITLE, 2.

ESTOPPEL—Continued.

Essential qualities,	n.133
Must be a misleading to the prejudice of the party setting it up,	n.133
IN LAW. —Must be willful,	n.130
In <i>pais</i> , must be fraudulent,	n.131
And contrary to some previous act or assertion,	n.132
To be binding, party must derive some advantage or consideration,	n.132
What length of time will work an estoppel,	n.39
What special circumstances affect the rule,	n.169
Partial abandonment of right does not estop,	n.203
When applied to husband and wife,	n.296
Where minor is estopped,	n.308
See AGENTS, 15, 16, 17; ACQUESCENCE, 1, 2.	
By deed. See PRACTICE, 1.	
Legislative. See CHARITABLE BEQUESTS, 5; CORPORATION, 19; HUSBAND AND WIFE, 5, 6, 8.	

EXECUTORS' CONTINUING PARTNERSHIP:

1. By articles of partnership, it was stipulated that, in case of death, the partnership should cease on a certain subsequent day, and the property of the partnership be then divided between the surviving partners and the executors of the deceased partner. One partner, by his will, directed all his property to be converted and invested for the benefit of his children, and appointed his copartners executors, and died, leaving his children infants. The surviving copartners proved his will, had the property of the partnership valued, and then continued the business under a new firm, and debited the new firm with the value of the testator's share of the partnership property, but did not otherwise execute the directions either of the articles or of the will. *Held*, that the transaction must be treated as a nullity, so far as the children's interests were concerned. *Wedderburn v. Wedderburn*, 18 Eng. Ch. 40, 348
 2. **WHEN SURVIVING PARTNERS HELD ANSWERABLE FOR PROFITS.**—The executors of a testator, his surviving partners, continued to employ his share of the partnership capital in trade, held answerable for a proportionate share of the profits, notwithstanding that the capital of the partnership, at the time of the decease, consisted of debts due the partnership.—*Ib.*
 3. **RIGHTS OF MINORS.**—Degree of weight to be attached to deeds of release executed by *cestui que trust* within a few days after their coming of age, when such releases profess to proceed upon the examination of complicated accounts.—*Ib.*
 4. Difficulties of enforcing in chancery a *cestui que trust's* right (however clear) to participate in profits of a trade carried on in part with the trust fund, 349
 5. Accounts in this case were opened after great lapse of time.
- See ACCOUNTS, 1, 2.

EXECUTOR'S IMPROVING TRUST ESTATE:

1. **EXECUTOR.**—*Tenant for life*—*Right of executor who has expended money in improving testator's real property*—*Right of tenant for life against remainder-man*—*Right of trustee as against cestui que trust.*—C was, at the time of his death, seized of a plat of ground upon which he had commenced to build certain houses. By his will he devised all his real and personal property to his father for life, upon trust, as to one moiety of the rents and profits for him—

EXECUTOR'S IMPROVING TRUST ESTATE—*Continued.*

self, and as to the other for other parties, with remainder over. The father became the personal representative of C, and after his death expended large sums of money in completing the houses. *Held*, that the father was not entitled to a charge upon the plat of ground for the moneys expended by him, either as a tenant for life, trustee, or personal representative of C. *Gilliland v. Crawford*, 4 Irish (Equity Series), 35, 392

EXECUTORS' PURCHASE OF TRUST PROPERTY:

1. WILL.—A testator bequeathed legacies to his children, and directed that so much of his real estate as should be necessary to furnish the sums bequeathed, should be sold at public auction. *It was held*, that the sole acting executor had power to sell the real estate under the will. *Davoue v. Fanning*, 2 Johns. Ch. 252, 1
2. PURCHASE BY TRUSTEE.—If a trustee sells the trust estate, and becomes interested in the purchase, the *cestui que trusts* are entitled, as of course, to have the purchase set aside, and the property re-exposed to sale, under the direction of the Court. And it makes no difference that the sale was at public auction, *bona fide*, and for a fair price, and that the executor did not purchase, but a third person became the purchaser, to hold in trust for the separate use of the wife of the executor, who was one of the *cestui que trusts*, and had an interest in the land under the will of the testator.—*Ib.*
3. A person can not legally purchase on his own account that which his duty or trust requires him to sell on account of another, nor purchase on account of another that which he sells on his own account. He is not allowed to unite the two opposite characters of buyer and seller. *Michoud v. Girod*, 4 Howard, 503, 42
4. A purchase, *per interpositam personam*, by a trustee or agent, of the particular property of which he has the sale, or in which he represents another, whether he has an interest in it or not, carries fraud on the face of it.—*Ib.*
5. This rule applies to a purchase by executors, at open sale, although they were empowered by the will to sell the estate of their testator for the benefit of heirs and legatees, a part of which heirs and legatees they themselves were. A purchase so made by executors will be set aside.—*Ib.*
6. The decisions of the courts of several States, upon this subject, examined and remarked upon.—*Ib.*
7. SPANISH LAW.—Relaxations of this rule of the civil law were not adopted by the Spanish law, and of course never reached Louisiana. Nor were those relaxations carried so far as to allow a testamentary or dative executor to buy the property which he was appointed to administer.—*Ib.*
8. The maxims and qualifications of the civil law, upon this point, examined, 43
9. FRAUD.—Although courts of equity generally adopt the statutes of limitation, yet, in a case of actual fraud, they will grant relief within the life-time of either of the parties upon whom the fraud is proved, or within thirty years after it has been discovered or become known to the party whose rights are affected by it.—*Ib.*
10. Within what time a constructive trust will be barred must depend upon the circumstances of the case, and these are always examinable.—*Ib.*
11. Acquittances given to an executor, without a full knowledge of all the circumstances, where such information had been withheld by the exec-

EXECUTORS' PURCHASE OF TRUST PROPERTY—*Continued.*

utor, and menaces and promises thrown out to prevent inquiry, are not binding.—*Ib.*

12. RULE AS TO PURCHASE BY TRUSTEE.—A purchase made by a trustee or guardian of the trust property, or by an executor of the estate of his testator, from himself, during the continuance of the fiduciary character of the purchaser, will not be sanctioned, unless it be made under the authority of the court, and consent of the persons beneficially entitled to the property, who are competent to consent; and even then it will be regarded with suspicion. Such a purchase, however fair, is voidable at the option of the *cestui que trust*. Nor is it necessary to show that the trustee has made any profit or obtained any advantage by his purchase; but it will be supported if found to be beneficial to the trust estate. *Faucett v. Faucett*, 1 Bush, 511, 177
13. MUST NOT CREATE AN INTEREST IN HIMSELF AGAINST CESTUI QUE TRUST.—A trustee or executor will not be permitted to create in himself an interest opposite to that of the party for whom he acts, nor to traffic in the estate for his own emolument. This principle applies also to administrators.—*Ib.*
14. WHERE TRUSTEE BUYS AT A SALE NOT HIS OWN.—An executor brought suit in equity to subject the land of a debtor of the testator to the payment of the debt. Pending that suit, the land was sold under a decree in favor of the debtor's vendor for a balance of the purchase-money, and the executor bought it. He afterward sold and conveyed the land to a stranger, for more than enough to reimburse what he had paid for it, and to satisfy the debt due his testator. *Held*, that he was bound so to apply the proceeds, but was not bound for the surplus. *Longest v. Tyler*, 1 Duvall, 192, . . . 173
15. The doctrine of constructive fraud operates to prevent infidelity or spoliation in a class of cases embracing executors and other trustees, in which there may be temptations and facilities to rapacity.—*Ib.*
16. It is the duty of trustees to guard, in good faith, the interests of their beneficiaries, and never to speculate on them, or through means afforded by them.—*Ib.*
17. A trustee may purchase from the *cestui que trust* the trust estate; but such a transaction will be regarded with suspicion, and criticised with the utmost rigor; and, if attacked by the *cestui que trust*, it is incumbent on the trustee to show that it was fair and just in all respects, and consummated on his part with the most abundant good faith, and that the *cestui que trust* had all the information in relation to the trust estate possessed by the trustee. See 1 Lead. Cas. in Equity, 125. *Jones v. Smith*, 33 Mississippi, 215, 194
18. When the trustee has been guilty of no positive act of fraud in a purchase made by him from the *cestui que trust* of the trust estate, the latter will lose his right to annul the agreement if he fail to take steps to set aside the contract in a reasonable time after its consummation. The unreasonable delay will be held to be a ratification.—*Ib.*
This case doubted on the facts. See note (a), 202
19. The failure of the *cestui que trust* to take steps to set aside a sale made by him to the trustee of his trust estate, for three years and eight months, is unreasonable, where the trustee has not been guilty of any positive act of fraud or concealment, 194
20. A rescission of a contract will not be decreed at the instance of a party

EXECUTORS' PURCHASE OF TRUST PROPERTY—Continued.

guilty of negligence and unreasonable delay in asserting his rights, and when, from a change of circumstances, the parties can not be restored to the same situation they occupied before the contract was made.—*Ib.*

EXECUTORS—WHEN LIABLE:

1. Where trustees act within the scope of their authority, and exercise such prudence, care, and diligence as men of prudence, care, and diligence manifest in like matters of their own, they should not be held accountable for losses happening from their management of the trust funds. *Miller v. Chaplin*, 20 Ohio St. 442, 253
2. **POWER TO REINVEST.**—Where executors are directed by will to put money at interest for a specified length of time, by deposit in bank or loan upon mortgage, they have a discretion to loan it for less periods than the whole time named, and to reloan it, from time to time, and change the mortgage securities, as they may deem best for the parties interested.—*Ib.*
3. **CHANGING SECURITIES.**—In such case, if the executors are at fault in taking insufficient security for the loan, but subsequently procure the borrower to substitute therefor other security deemed by them sufficient, and such as they would have been justified in taking upon the original loan, they will not be held accountable for a loss happening through unforeseen defects in the latter security.—*Ib.*
4. **WHAT IS REAL ESTATE SECURITY?**—A mortgage executed by an individual member of a firm, upon land the legal title to which is vested in him, but which is in fact owned and used by the firm as partnership property, is "real estate" security, within the meaning of a clause in the will directing such security to be taken for money loaned.—*Ib.*
- Doubted. See Dissenting Opinion, 258
5. **MUST EXECUTORS KNOW THE LAW?**—The maxim that every person is presumed to know the law, is not always applicable to trustees. On the contrary, they may be exonerated from losses resulting from their ignorance of the law, in cases where they exercise proper diligence and precaution, and act upon the advice of counsel, 253
- WHITE and M'ILVAINE, JJ., dissenting.** See Dissenting Opinion, 258
- See **GUARDIAN AND WARD**, 1, 2.

FRAUD:

1. **DIRECTORS' PURCHASE FRAUDULENT.**—Where a mortgage by a railroad company, upon its railroad and appurtenances, had been foreclosed, a sale made and confirmed, and a new company had been organized by the purchasers, being the directors who made the mortgage, and others holding the bonds secured thereby, upon a creditor's bill: *Held*, on the facts of the case, that the sale was fraudulent, and that it should be set aside, and the new company perpetually enjoined from setting up any right or title under it; the mortgage to remain as security for the bonds in the hands of *bona fide* holders for value, and that the judgment creditors be at liberty to enforce their judgments against the defendants, subject to all prior incumbrances. *James v. Railroad Co.*, 6 Wallace, 752, 289
2. **FRAUDULENT SALE.**—Where the notice of the sale of a railroad under mortgage to secure railroad bonds, set forth that the sum due under the mortgage was \$2,000,000, with \$70,000 interest, when less than \$200,000 was in the hands of *bona fide* holders, the remainder being in the hands of

FRAUD—Continued.

- directors, or under their control, such a notice was fraudulent, and sufficient to vitiate the sale, 290
- Rule as to constructive fraud. See EXECUTORS' PURCHASE OF TRUST PROPERTY, 15, 16.
- Rule as to actual fraud. See EXECUTORS' PURCHASE OF TRUST PROPERTY, 9.
- Vitiates every transaction, n.368
- See LIMITATION OF ACTIONS, 1, 4.
- By attorney. See ATTORNEY, 2.
- See DIRECTORS, 9 to 19; EXECUTORS' PURCHASE OF TRUST PROPERTY, 9.

GRANTOR AND GRANTEE:

- When the grantee has knowledge that the grantor was a director in the corporation of the beneficiary at the time he acquired the property, the latter is put upon inquiry as to the character of the title to the property which the director thus acquired. *Cov. & Lex. R. R. Co. v. Bowler, et als.*, . . . 468
- See PURCHASER.

GUARDIAN AND WARD:

1. DUTY OF GUARDIAN.—When the law intrusts the estate of an infant to the care of a guardian, the fiduciary undertakes to be vigilant, faithful, and competent. These imply as much knowledge of law as may be necessary for safety; this, however procured, he assumes to possess and properly exercise. *Hemphill v. Lewis*, 7 Bush, 214, 250
 2. HIS RESPONSIBILITY.—A second guardian sued the former guardian to recover estate of his ward, and being erroneously advised that such demand was a preferred claim against such former guardian's estate, he did not sue the surety of the former guardian. The debt was lost because the suit was not prosecuted in time. The second guardian is held responsible. Fiduciary demands have priority only against the estates of dead persons.—*Ib.*
 3. PRACTICE.—In a proceeding against heirs, a personal judgment against the husband of an heir is wrong when the record does not show why the husband should be held responsible.—*Ib.*
- Transactions between, on ward's arriving at age, n.355
- Burthen of proof on guardian—*Ib.*
- Ratification by ward, when presumed.—*Ib.*
- The rule applies to other parties.—*Ib.*
- When liable. See EXECUTORS, 5.

HEIR:

1. In a suit in chancery, brought by heirs, a disclaimer by one of the heirs does not vest the interest so disclaimed in the remaining heirs. *Kane County v. Herrington*, 50 Illinois, 232, 159
- Can disaffirm purchase by administrator. See ADMINISTRATORS' PURCHASE OF TRUST ESTATE, 3, 4.
- Where estate insolvent, can not impeach purchase by trustee. See ADMINISTRATOR—WHEN NOT CHARGEABLE AS TRUSTEE, 3.
- How warrantee affects the heir. See CONVEYANCE, 1.
- Right of heirs to surplus of bequest. See CHARITABLE BEQUEST, 12.

HUSBAND AND WIFE:

1. COVENANT OF HUSBAND ON SEPARATION.—A covenant by a husband for the maintenance of the wife, in a deed of separation, where the consideration is

HUSBAND AND WIFE—*Continued.*

- apparent, must now be regarded on authority as valid, notwithstanding the serious objections to such deeds. It will accordingly be enforced in equity, if it appear that the deed was not made in contemplation of a future possible separation, but in respect to one which was to occur immediately, or for the continuance of one that had already taken place. *Walker v. Walker's Executors*, 9 Wallace, 743, 310
 2. The validity of such a covenant is not impaired by a provision that, if the parties should afterward come together, the trust should remain and be executed in like manner as if they should remain separate.—*Ib.*
 3. HUSBAND TRUSTEE FOR WIFE.—A husband may be chargeable, as trustee, with the income of his wife's separate property, if he have received it from her to invest it for her, whether the income be of property which he has settled upon her, or from some other separate property of hers.—*Ib.*
 4. PRACTICE OF FEDERAL COURTS.—The Federal courts, where they have jurisdiction, will enforce the same rules in the adjustment of claims against ancillary executors, that the local courts would do in favor of their own citizens.—*Ib.*
 5. NO ESTOPPEL.—A widow, formal party to a deed of compromise between the heirs-at-law of a decedent and his residuary devisees, by which a specific sum is given to the former and the residue of the estate to the latter, does not estop herself from coming upon the estate for separate moneys of hers, received by her husband to invest for her, but which he did not so invest.—*Ib.*
 6. Nor does she estop herself from asserting such a claim against her husband's executors, by her acceptance of a provision under his will, in satisfaction of dower.—*Ib.*
 7. HUSBAND CHARGED WITH COMPOUND INTEREST.—The estate of a husband, who had maltreated his wife, and obtained from her the income of her separate property under a promise to invest it for her, but who did not so invest it, charged after his death with interest, compounded annually, through a long term of years, and deprived of all commissions for services as trustee, 311
 8. ESTOPPEL OF WIFE.—Where a husband, holding title to land in trust for his wife, at her request, sells the same to a stranger, a specific execution of the contract will be decreed against the husband, although the wife joins the husband in resisting the same. *Rostetter and Wife v. Grant*, 18 Ohio St. 126, 293
 9. NO DOWER IN WIFE'S EQUITY.—As the right of the wife in such case is a mere equity, and she can have no claim of dower in the property, it is unnecessary for her to join in the deed, in order to vest in the purchaser a title freed from her claim; and it is not error in the court to order the husband to convey such title.—*Ib.*
 10. MARRIAGE SETTLEMENT.—Where the draft of a supposed settlement in contemplation of the marriage of an infant ward of court, containing a covenant to settle after-acquired property, but no provision as to a second marriage, was approved by the intended husband but never executed, though a post-nuptial settlement in different terms was executed, the court varied the latter settlement by adding the covenant as to after-acquired property. *Re Hoare's Trusts*, 4 Giffard's Ch. 254, 403
- Husband estopped by marriage settlement, although voidable by the wife, *n.* 296

HUSBAND AND WIFE—Continued.

Wife barred by lapse of time,	n.296
Where wife can recover her life estate wrongfully pledged,	n.387
Wife's ante-nuptial set aside by husband,	n.407
Wife's equities prevail against husband's creditors,	n.308
Authorities sustaining contracts for separation,	n.315
Where wife's property is not reduced to possession by husband,	n.308
A marriage settlement drawn by husband held not binding.— <i>Ib.</i>	

IGNORANCE AND WANT OF EDUCATION :

1. The fact that a person is unlearned, affords no ground of relief in equity, unless it also appears that he relied upon the person against whom relief is sought, and such person misrepresented the facts. *Boyd v. Blankman*, 29 California, 19, 148
- When it will excuse lapse of time in bringing suit, n.39

INNOCENT PURCHASER:

See PURCHASER, 4.

INSOLVENCY :

1. If an insolvent corporation should become a bidder for its own property at a judicial sale, and comply with the terms thereof, it would in such case become the purchaser; and there is no valid reason to deprive it of the right to charge its trustee as such purchaser, and he can not set up the insolvency of his beneficiary as a defense. *Cov. & Lex. R. R. Co. v. Bowler, et als.*, 468
2. In this case it is the duty of the appellant to pay its debts; and if this can not be done, still it is its duty to require possession of the road, that it may be again sold for the benefit of creditors whose debts have not been paid. The appellees have no right to demand a resale, but the creditors have the right so to do, in a proper tribunal, in default of the payment of their just claims.—*Ib.*

INTEREST ON MONEY :

See HUSBAND AND WIFE, 8.

When payable, syllabus, 262

See TRUSTEE UNDER WILL, 16, 17; AGENTS, 21.

INTEREST—PERSONAL:

1. WHAT INTEREST DISQUALIFIES A JUDGE.—An incorporated company filed a bill against a land-owner in a matter largely involving the interests of the company. The Lord Chancellor had an interest as a shareholder, a fact which was unknown to the defendant in the suit. The Vice-Chancellor granted the relief sought. The Lord Chancellor, on appeal, affirmed the order of the Vice-Chancellor: *Held*, that the Lord Chancellor was disqualified, on the ground of interest, from sitting as judge in the case, and that his decree was voidable, and must be reversed. *Held, also*, that the Vice-Chancellor is, under the 53 Geo. 3, ch. 24, a judge subordinate to, but not dependent on, the Lord Chancellor, and that his decree might be made the subject of appeal to the House of Lords. *Dimes v. Grand Junction Canal*, 3 House of Lords Cases, 759, 456

INVESTMENT OF TRUST FUND :

See TRUSTEE UNDER WILL; EXECUTORS—WHEN LIABLE; TRUSTEE.

JUDGE:

What interest disqualifies. See **INTEREST—PERSONAL**, 1.

JURISDICTION:

1. Where a judicial sale made by the Fayette Circuit Court, and the supervision of the property sold is retained by the Court for the purpose of carrying out the terms of the sale, the Kenton Circuit Court has jurisdiction in an original action to charge the purchaser of such property as trustee for the original owners. Neither court will be required to subordinate itself to the other. *Cov. & Lex. R. R. Co. v. Bowler, et als.*, 466

LACHES:

- What will bar a legal title will bar equity, n.38
 What circumstances will excuse delay, n.39
 To avoid, the circumstances must be averred and proved, n.169
 Held to bind a widow on remarriage, n.203
 See **TRUSTEE**, 1.

LAPSE OF TIME:

- What length of time will bar suit, n.39
 Merely as such, does not bar.—*Ib.*
 Under special circumstances, may bar, n.169, n.170
 Held to bar in a doubted case, n.202
 Where it affirms voidable acts, n.296
 When it affects rights of beneficiary. See **AGENTS**, 7, 13.
 See **TRUSTEE**, 4; **ACCOUNTS**, 2.

LIFE TENANT:

See **ESTATE FOR LIFE**; **TRUSTEE UNDER WILL**, 1, 2.

LIMITATION OF ACTIONS:

1. **IN CALIFORNIA.**—The Statute of Limitations is applicable alike to causes of action in equity and at law. When the action is for relief on the ground of fraud, accrued more than three years before the commencement of the action, the complaint should also aver that the acts constituting the fraud had been discovered within three years; but if the replication contains this averment, and this issue is tried without objection, the irregularity will be disregarded. *Boyd v. Blankman*, 29 California, 19, . . . 148
2. A defendant relying on the statute should not allege matter of law, but the facts which bring him within the statute.—*Ib.*
3. An answer stating that the cause of action has not accrued within five years, is sufficient for five years; and for any period of limitation named in the statute, less than five years.—*Ib.*
4. **DISCOVERY OF FRAUD.**—The clause in the Statute of Limitations, providing that an action for relief on the ground of fraud shall not be deemed to have accrued until the discovery of the facts, is applicable to constructive fraud as well as fraud in fact, and may be commenced at any time within three years after a discovery of the facts constituting the fraud, or of facts sufficient to put a person on inquiry.—*Ib.*
5. Where the petition alleges breaches of trust, whereby the trust property (a railroad) is sold, and one of the directors becomes the purchaser, and the prayer is that such purchase be annulled, the property be declared to be held in trust, and adjudged to be reconveyed to the beneficiary, and for an account, the suit is not for the recovery of real estate, as contemplated by

LIMITATION OF ACTIONS—*Continued.*

- sec. 2, art. 1, ch. 63, 2 Rev. Stat. 123, or for relief on the ground of fraud; but is a suit to declare and enforce an implied or constructive trust, and is barred in five years. *Cov. & Lex. R. R. Co. v. Bowler, et als.*, . . . 466
6. In such case, the purchaser having deceased within five years from the time of his purchase, and the suit brought within one year after letters of administration were taken out on his estate, the suit is within the time limited by the statute.—*Ib.*
- Equity follows the time prescribed by law, . . . *n.145, n.146, n.203, n.204*
- Does not apply to continuing and subsisting trusts, . . . *n.249*
- Statute runs against town in regard to public property, . . . *n.344*
- See AGENCY AFFECTING REAL ESTATE, 7, 13; TRUSTEE, 1, 2; TRUSTEE UNDER WILL, 1, 2, 3, 4; EQUITABLE TITLE, 3.

MANDATE:

- In *Covington and Lexington Railroad Co. v. Bowler, et als.*, . . . 596

MINORITY:

- When it will be excuse for delay in bringing suit, . . . *n.39*
- Where minor is estopped, . . . *n.296, n.308*
- What weight to be attached to release on arriving at age. See EXECUTORS' CONTINUING PARTNERSHIP, 1.
- When not bound by acquiescence, . . . *n.170*
- Opening accounts by, reason of. See ACCOUNTS, 1, 2.
- When minors not estopped. See ESTOPPEL, 1.

MORTGAGE:

- See EQUITY; FRAUD.
- Difference between mortgage and deed of trust, . . . *n.425*
- Where deed of trust will be held a mortgage.—*Ib.*
- Where condition of defeasance held not to be a conditional sale. *Honore v. Hutchings*, 8 Bush, 687, . . . 420

MULTIFARIOUSNESS:

- See PLEADING AND PRACTICE, 1, 2.

MUNICIPAL CORPORATIONS:

- See CHARITABLE BEQUESTS, 2, 3, 4, 13, 14.
- Statute of Limitations runs against, . . . *n.344*

NOTICE:

- See AGENCY AFFECTING REAL ESTATE, 5, 6.
- Constructive, when held sufficient, . . . *n.407*
- Contra, see PURCHASER WITH NOTICE, 3.
- See DIRECTOR, 10, 11, 15; PURCHASER, 1, 2, 3.

PARTIES:

1. NECESSARY PARTIES.—In a case where, notwithstanding a conveyance in trust, the relation of trustee for the corporation continued in the original purchaser, the director and his representatives should be made a party in a suit to establish a claim against the trust property; and the suit being also for the recovery of the property itself, the beneficiaries under the conveyance in trust are also necessary parties in the suit. *Cov. & Lex. R. R. Co. v. Bowler, et als.*, . . . 467
2. Where the title held is a naked trust, with only a limited power to convey,

PARTIES—Continued.

and the management rests with the beneficiaries, the heirs of a deceased beneficiary are necessary parties in a suit to establish the implied trust arising from the directorship and purchase during its continuance, . . . 468

PERPETUAL USES:

Where an interest equivalent to a fee passes, n.344

Wherever the legal title goes, it is burthened with the trust.—*Ib.*

PERSONAL INTEREST:

What interest disqualifies a judge. See **INTEREST—PERSONAL**, 1.

PLEADING AND PRACTICE:

1. Whether a bill in equity is open to the objection of multifariousness, must be decided upon all the circumstances of the case. No general rule can be laid down, and much must be left to the discretion of the court. *Piatt v. Oliver*, 3 Howard, 333, 19
2. The objection of multifariousness can be taken only by demurrer, plea, or answer, and not at the hearing of the cause. But the court itself may take the objection at any time. The objection can not be taken in the appellate court.—*Ib.*
3. Where exceptions are taken to a master's report, it is not necessary for the court to allow or disallow them on the record. It will be sufficient if it appears from the record, that all of them have been considered, and allowed or disallowed, and the report reformed accordingly.—*Ib.*
4. **JOINT WRONG-DOERS.**—If several trustees are implicated in a common breach of trust, for which the *cestui que trust* seeks relief in equity, he may bring his suit against all of them, or against any of them, separately, at his election, the tort being treated as several as well as joint: And the same doctrine applies to any wrong-doer who is confederated with a fraudulent trustee. *Heath v. Erie Railway Co.*, 8 Blatch. 347, 431
5. **PARTIES.**—It is not necessary that the directors should be made parties, although the bill prays for an injunction against the corporation, and for a receiver of the corporation, if no relief is asked as against such directors. The bill in this case was allowed to be amended by striking out the name of a person improperly joined as plaintiff.—*Ib.*

To excuse laches, etc., must specify cause and make proof thereof, . . . n.169

Where stockholders are proper parties, n.268

Where they can sue their directors.—*Ib.*

Legal proceedings can not be impeached collaterally, syllabus, . . . 373, n.377

See **ADMINISTRATOR'S PURCHASE OF TRUST ESTATE**, 4, 5; **LIMITATION OF ACTIONS**, 1, 2, 3, 4; **TRUSTEE**; **CHARITABLE BEQUESTS**, 14; **PARTIES**; **PRACTICE**.

POSSESSION:

Effect on equitable claim. See **RESULTING TRUST**, 4; **ADVERSE POSSESSION**.

PRACTICE:

1. Where the purchaser at a judicial sale claims a vendible interest in the property, and executes a conveyance thereof in trust, the holders themselves recognize such power by purchasing such interest; and being held in trust, the beneficiary can call upon a court of equity to declare the same,

PRACTICE—*Continued.*

- and compel a relinquishment of the claim thereto. *Cov. & Lex. R. R. Co. v. Bowler, et als.*, 468
- See CLERK, 2; GUARDIAN AND WARD, 3; RESULTING TRUST, 5; PLEADING AND PRACTICE; TRUSTEE UNDER WILL, 7.
- In the Federal courts. See HUSBAND AND WIFE, 4.
- See DIRECTOR, 19; LIMITATION OF ACTIONS, 1, 2, 3, 4, 5; PARTIES, 1, 2; INSOLVENCY, 1, 2.

PRESIDENT OF A CORPORATION:

- See CORPORATION, 10, 11, 12, 13, 14.
- When authorized to continue the former business of his company. See *Murrey v. Vanderbilt*, 103
- His relation to the company. See *York, etc., R. R. Co. v. Hudson*, 59

PURCHASER—WITH NOTICE:

1. CONSTRUCTIVE NOTICE.—Where, upon the face of the title-papers, the purchaser has full means of acquiring complete knowledge of the title from the references therein, he will be deemed to have constructive notice thereof. *Oliver v. Piatt*, 3 Howard, 333, 19
 2. CO-PROPRIETOR.—A co-proprietor of real property, derived under the same title as the other proprietors, is presumed to have full knowledge of the objects and purposes and trusts attached to the original purchase, and for which it is then held for their common benefit.—*Ib.*
 3. WHEN INNOCENT PURCHASER.—A purchaser by a deed of quit-claim without warranty, is not entitled to protection in equity as a purchaser for a valuable consideration, without notice; and he takes only what the vendor could lawfully convey.—*Ib.*
 4. INNOCENT PURCHASERS.—Where a special warranty of title is taken by the grantee under such circumstances as imply knowledge that the property was held in trust, the grantee is not an innocent purchaser entitled to hold against a beneficiary of the grantor. *Cov. & Lex. R. R. Co. v. Bowler, et als.*, 468
- See GRANTOR AND GRANTEE; AGENCY AFFECTING REAL ESTATE, 6.

RATIFICATION, OR CONFIRMATION:

- See ACQUIESCENCE; CONFIRMATION BY CESTUI QUE TRUST; ELECTION; DIRECTOR, 14.
- Effect of partial confirmation, 39

REAL ESTATE AGENT:

- See AGENTS, 14, 15, 16, 17.

REDEMPTION:

- Rule governing. See AGENTS, 12, 21.

RELEASE:

- See EXECUTORS' PURCHASE OF TRUST PROPERTY, 11; ACCOUNTS, 1, 2.

RESULTING TRUST:

1. FATHER HELD AS TRUSTEE FOR CHILD—RIGHTS OF CREDITORS.—A married woman relinquished her dower in five hundred acres of land sold and conveyed by her husband to their son-in-law, on the condition that their single daughter should have one hundred acres of the land, or its equivalent, ten thousand dollars, to secure her a home. *Faris v. Dunn*, 7 Bush, 276, . . . 297

RESULTING TRUST—*Continued.*

2. RESULTING TRUST.—The father bought for his daughter a hundred acres of land selected by her, and paid for it with her money, received and held for that purpose, and without her knowledge or consent took the conveyance of the legal title to himself. Immediately after the purchase, in 1852, the father put his daughter in possession of the land so bought for her, where ever since she has resided as her only home. *A trust was thus raised in favor of the daughter in possession*, which was sufficient to protect her possession and title against the mortgagees of her father.—*Ib.*
3. RESULTING TRUSTS—HOW ESTABLISHED.—*Resulting trusts may be established by oral testimony as satisfactorily as by written evidence.*—*Ib.*
4. PRIOR EQUITY.—A party having a prior subsisting equity—an available resulting trust—combined with long possession, under a verbal contract not void—would have a sufficient defense, even if not enforceable as a trust against parties in adverse possession. A good defense to a party in possession of land, might not be enforceable as a good cause of action against another party in the adverse possession of the same land.—*Ib.*
5. PRACTICE.—Purchaser of one's own land at a decretal sale—purchaser is released from bonds for purchase price. The surety is required to litigate his liability on the bonds for the purchase of the land, as if substituted to the place of the principal, while the principal is fully released. See the opinion and response of the court for the facts and reasons for this decision.—*Ib.*
6. When the owner of a claim to Government land sold a portion of his claim to another, to pay the money necessary to secure the remaining interest in such claim to his vendor, and the money was paid, the equitable interest attached to the land, and an estate in trust resulted therefrom. *Kane County v. Herrington*, 50 Illinois, 232, 158
7. STATUTE OF FRAUDS.—Resulting trusts are not embraced in the statute of frauds, but only express trusts, resting in parol, or other verbal agreements for the sale of lands, are within the purview of the statute.—*Ib.*
8. EQUITABLE INTEREST.—A owned a claim, and sold a portion of his claim to B, in consideration that B would pay a sum to secure the title to the remaining portion in A. Afterward A died, and the purchase by B was made and perfected after his death. *Held*, that B held the money in trust for the heirs of A, and that, by a subsequent payment, the equitable interest of the heirs in the money attached to the land, and an estate in trust was thereby created. But after the death of A, and before the money was paid by B, one of the heirs died. *Held*, that such heir did not have an estate of inheritance in such purchase that could pass by descent to his heirs, . . . 159
9. A RESULTING TRUST AND PLEDGE OR MORTGAGE NOT A CONDITIONAL SALE.—Hutchings and Honore jointly purchased thirty acres of land. Hutchings advanced the purchase-price, took a conveyance to himself, and executed a writing in which it is agreed that when said land is sold, Hutchings is to have his six thousand dollars, and ten per cent interest, and the profits over and above said sum are to be equally divided between said parties. "This arrangement is to continue eighteen months, when, if the property has not been sold, Honore is to pay one-half the sum so advanced, with interest, or said Hutchings is to be the sole owner of the same." The land was not sold within the eighteen months, and Honore failed to pay any part

RESULTING TRUST—Continued.

of the sum so advanced. *Held*, that a trust resulted in favor of Honore to the extent of one-half of the land jointly purchased. This interest he pledged to Hutchings to secure the repayment to him of one-half the purchase-price advanced, etc.; and Honore is entitled to one-half of the net profits realized upon the resale of the same. *Honore v. Hutchings*, 8 Bush, 687, 420

10. **NOT A CONDITIONAL SALE.**—The conveyance to Hutchings and the condition of defeasance executed by him to Honore must be construed together, as though the one was incorporated into the other. When so construed, the one took an absolute title to the joint property of both, having first executed to the other a condition of defeasance. In such a case the onus devolves on the party who insists that the contract was a conditional sale, 421

11. **BUT A MORTGAGE.**—Such an arrangement is perfectly consistent with the idea of a mortgage, and the rule is, that in all doubtful cases, the law will construe a contract to be a mortgage.—*Ib.*

12. **DISTINCTION BETWEEN A MORTGAGE AND A CONDITIONAL SALE.**—Where the debt still subsists, or the money is advanced by way of loan, with a personal liability to repay it, and by the terms of the agreement the land is to be reconveyed on payment of the money, it will be regarded as a mortgage; but where the relation of debtor and creditor is extinguished or never existed, there a similar agreement will be considered as merely a conditional sale.—*Ib.*

13. **PRESUMPTION IN FAVOR OF COMMON LAW.**—The common law will be presumed to be in force in a state where a transaction took place, when there is nothing in the record showing the contrary.—*Ib.*

Where a resulting trust does arise, n.308, n.425

By contract between husband and wife.—*Ib.*

And creditors of husband can not subject wife's property.—*Ib.*

Creditor can not prevail against wife's equity.—*Ib.*

Where a resulting trust does not arise, n.309

May fail for want of certainty.—*Ib.*

Can not arise when conveyance is for "love and affection."—*Ib.*

SALE:

Fraudulent. See **DIRECTOR**, 9 to 19; **FRAUD**, 1, 2.

SALE—CONDITIONAL:

Difference between, and resulting trust. See **RESULTING TRUST**, 9, 10, 11, 12.

Where deed absolute held a mortgage, n.425

SCOTCH LAW:

On trusts. See **DIRECTOR**, 6.

SPANISH LAW:

On trusts, 54

STALE CLAIM:

See **LACHES**; **LAPSE OF TIME**; **STATUTE OF LIMITATIONS**; **TRUSTEE**, 1.

STOCKHOLDER:

1. **WHO ARE STOCKHOLDERS?**—A person who has no shares standing in his name, but has purchased shares from persons who have, and holds power to transfer the same, and has requested the same to be transferred, but the

STOCKHOLDER—*Continued.*

- defendants have wrongfully refused to transfer the same, is not a stockholder, and can not be joined, as plaintiff, with persons who are stockholders; and, if the suit is a joint one, his want of interest is a good ground of demurrer to the whole bill. *Heath v. Erie Railway Co.*, 8 Blatch. 347, . . . 431
- Acquiescence for years not binding where acts beyond power of the company, n.72
- See CORPORATION, 16.
- Can not answer for the corporation, n.268
- Where they are proper parties.—*Ib.*
- When they can sue directors.—*Ib.* See CORPORATION, 15.
- Permitted to be parties on dissolution of corporation. See CORPORATION, 4.
- Property of corporation a trust fund for benefit of. See CORPORATION, 1.
- See PRACTICE; ULTRA VIRES; ESTOPPEL, 8.

TENANT IN COMMON:

- See AGENCY AFFECTING REAL ESTATE, 10, 11, 12.

TENANT FOR LIFE:

- See ESTATE FOR LIFE; TRUSTEE UNDER WILL, 1, 2; EXECUTORS' IMPROVING TRUST ESTATE, 1.

TRUSTEE:

- Rule governing. See DIRECTOR.
- Who are, n.48
- When not, 373
- Can not act for his own benefit in contracts relating to the trust, . . . n.175
- Nor use information gained as trustee for his own benefit.—*Ib.*
- Is entitled to cost only of purchases against the trust.—*Ib.*
- And can not do any act to prejudice the trust.—*Ib.*
- Apply to all coming within the relation, n.176
- When liable for loss of trust fund, n.252
1. STALE DEMANDS.—Though the rule as to limitation by time does not apply in the case of express trusts, yet, as to them, in equity the general rule is, that stale demands are not to be encouraged. *M'Donnell v. White*, 11 House of Lords Cases, 570, 166
2. ACCOUNTS.—In taking accounts against a trustee, when he is to be fixed with a personal liability, his good faith is to be considered, and every fair allowance is to be made in his favor, especially if the demand against him is one which arose many years ago, and the beneficiary was at the time cognizant of all the matters connected with it.—*Ib.*
3. LIABILITY OF TRUSTEE.—A, in debt, executed a deed of trust for the benefit of creditors, and among the property assigned was a lease for lives renewable forever, on a high rack-rent; the tenant complained, and the trustee, with the knowledge of A, though without his consent, but with the full assent of A's brother, to whom A had committed the management of his affairs, received from the tenant an abated rent; A complained of the abatement, but he took no steps to put an end to it. *Held*, that the estate of the trustee could not, after the expiration of the trust, be called upon to make up the deficiency.—*Ib.*
4. LAPSE OF TIME.—While the trust was in existence, A, who had been absent from the country, returned, was informed of all that had occurred, and made an affidavit in a suit instituted by one of his creditors. In this suit

TRUSTEE—*Continued.*

a receiver was appointed over one of the estates. *Held*, that from the date of this appointment the power of the trustee was at an end, and that, as by the law of Ireland, the receiver's duty related as well to the arrears then due from the tenants of that estate as to those which afterward would become due, and no steps having been taken to enforce payment from the trustee of arrears, his estate could not, after the lapse of many years, be made liable for those arrears.—*Ib.*

5. BREACHES OF TRUST CONSIDERED.—Diverting the means of a railroad from paying interest on preferred-mortgage claims in suit, and for default in which a sale is ordered, to making improvements on the road which might have been dispensed with, or deferred, evidences an intention to bring the road to sale. *Cov. & Lex. R. R. Co. v. Bowler, et als.*, 467
6. It is not a good defense on the part of the principal in such and similar transactions, that his co-directors participated therein and approved the same, because it is not denied that he exercised over such co-directors a controlling influence. From the time he concluded to prepare for the purchase of the road, his personal interests became antagonistic to that of the corporation, and he ought to have ceased to act as a director.—*Ib.*

Permitted to purchase trust property by approval of court, . . . 53, *n.* 53, *n.* 179

When permitted to deal with trust fund, *n.* 110

Doubted, *n.* 111

His discretion to sell and reinvest, *n.* 331

See EXECUTOR—WHEN LIABLE, 2.

When personally liable on his covenants. See CHURCH PROPERTY, 4, 5.

When appointment by court illegal. See CORPORATION, 6.

What is notice of a trust? See AGENCY AFFECTING REAL ESTATE, 5; NOTICE.

See ADMINISTRATORS' PURCHASE OF TRUST ESTATE; EXECUTORS' PURCHASE OF TRUST PROPERTY; AGENCY AFFECTING REAL ESTATE; DIRECTOR.

EX MALEFICIO:

1. TRUST.—Z bought a lot, took possession, and made improvements. Being unable to make the payments, he sold a part to S by parol, the division line being fixed by them. M, with the consent of Z, made the deed for the whole to S, he agreeing to hold the other part in trust for Z, and convey to him on his paying his share of the purchase-money. S refused to convey. *Held*, that he held in trust for Z, and could be compelled to convey; and, that while the act of 1856 destroys all parol trusts by contract, this trust arose by implication and construction of law, and is within the proviso of the fourth section. *Seichrist's Appeal*, 66 Penn. St. (16 P. F. Smith), 237, . . . 365
2. A trust arising from the fraud of the holder of the title is one by operation of law; and where one procures a title which he could not have obtained except by a confidence reposed in him, and abuses the confidence, he becomes a trustee *ex maleficio*.—*Ib.*

Case of a fraudulent grantee, *n.* 368

FOR MARRIED WOMAN:

When can bind trust fund, *n.* 296

Can sue in his own name.—*Ib.* See HUSBAND AND WIFE, 3, 7, 8, 9.

TRUSTEE UNDER WILL:

1. CHANGE OF TRUST PROPERTY.—An estate devised to a widow for life, with remainder to children, was disposed of by consent of all parties interested,

TRUSTEE UNDER WILL—*Continued.*

- and the proceeds deposited with one of the children, to be held subject to the use of the life-tenant, in lieu of the estate so disposed of. After the death of the life-tenant, the devisees in remainder instituted suit, in which a distribution of the fund was sought. The defendant, who held the fund, pleaded the statute of limitations. *Held*, that the fund was held in lieu of the estate disposed of, and subject to the life-estate and ultimate rights of the remainder-men; and that the statute of limitations did not commence to run until the termination of the life-estate. *Roberts v. Roberts*, 7 Bush. 100, . . . 246
2. STATUTE OF LIMITATIONS.—When a person holding a life-estate converts the entire estate to his own use, he becomes immediately responsible to the remainder-men, who have a right to recover against him the full value of their estate; and the cause of action, accrues as soon as the wrong has been committed, and from that time limitation runs.—*Ib.*
 3. RESULTING TRUST.—Under this state of facts, the transaction will constitute an express trust between the holder of the fund and those who will finally be entitled to it; and as in such a case there is no adverse possession of the fund, the trust will not be barred by any length of time.—*Ib.*
 4. RUNNING OF STATUTE.—In case of an express continuing trust, the statute does not begin to run, as against the *cestui que trust* and in favor of the trustee, until there has been some open express denial of the right.—*Ib.*
 5. TRUSTEE.—A testator gave all his estate to trustees to invest at their discretion; out of the income to pay annuities to his sons during their lives; the balance of the income for the use of his wife and daughter for their lives, as the wife might wish; any of the income not so used, to be invested by the trustees, permitting the wife to use part of the income for the sons; "the fund, after having been administered, to be held by the trustees, after the death of the wife, for the benefit of the daughter, the income to be applied to her use during her life." After the death of the wife and daughter, to be held in trust for the benefit of the children of sons and daughter until said children shall be twenty-one years of age, and then be equally divided among said children. *Held*, 1. That the trust remained during the lives of his sons as well as of his wife and daughter; 2. That the children of the sons and daughter took by purchase and not by limitation; 3. That the children's title to the fund vested at their birth; 4. That birth was not a contingency too remote to be unlawful. *Barclay v. Lewis*, 67 Penn. (17 P. F. Smith), 316, 362
 6. The daughter died unmarried and without issue, and the mother also died, the sons surviving, neither of whom had then any child; one was afterward born. *Held*, that the fund did not vest in the sons. The rule that a remainder requires a particular estate, does not apply to trusts. *Per HARE*, P. J.—*Ib.*
 7. In order to bind a trust by a decree, notwithstanding there be many limitations, it is sufficient to bring the trustee before the court, and him in whom the first remainder is vested; and all that may come after, although not in *esse*, will be bound.—*Ib.*
 8. NO VESTED INTEREST.—A testator devised to trustees to collect, etc., rents and income, and "pay said income, etc., or so much as the trustees may think proper, etc., under all the circumstances of the case, for the support and maintenance of my son Charles during his life." *Held*, that the income was

TRUSTEE UNDER WILL—*Continued.*

- not liable to attachment under a judgment against the son. The income was payable to the son at the discretion of the trustees. Until the discretion was exercised, the son had nothing. *Keyser v. Mitchell*, 67 Penn. St. (17 P. F. Smith), 473, 359
9. In such case, chancery will not interfere to control the trustees' discretion. This form of guarding the trust and the income from the prodigality of the son is as effectual as an express exclusion of the creditors by the will. *Girard Life Insurance and Trust Company v. Chambers*, 10 Wright, 485, distinguished.—*Ib.*
10. ILLEGAL PLEDGE OF TRUST PROPERTY.—In this case, persons who made loans of money to a trustee, on certificates of stock, and afterward sold the shares of stock to repay the loans, were held liable to *cestui que trust* for the proceeds of the shares. The transaction indicated that the trustee was not selling the shares in the ordinary course of business, as trustee, but that he was borrowing money, for his private use, on a pledge of what was in his hands as trust property; and that the lenders applied the proceeds to pay such private debts. *Jaudon v. National City Bank*, 8 Blatch. 430, . . . 379
11. TRUSTEE—EXECUTOR.—A trustee stands on a different footing from an executor, or an administrator, or even a guardian, in many respects. He presumptively holds his trust property for administration, and not for sale.—*Ib.*
12. WILL—TRUST.—C made a will leaving his whole property, real and personal, to G, whom he also appointed his executor. C told G where the will was, and with it a letter. This was all that was known to have passed between the parties. The letter named many persons to whom C wished sums of money to be given and annuities to be paid; but "I do not wish you to act strictly on the foregoing instructions, but leave it entirely to your own good judgment to do as you think I would, if living, and as the parties are deserving, etc." G paid money to some of the persons mentioned in the letter, but not to all. *Held*, that in this case there was not any trust created binding on G. *M'Cormick v. Grogan*, 4 English and Irish Appeals, 82, 397
13. DUTY IN MAKING INVESTMENTS OF TRUST FUND.—The law, in this State, imposes upon trustees, holding trust funds for investment for the benefit of minor children to be supported from the income accruing therefrom, the duty of placing them in a state of security, of seeing that they are productive of interest, and of so keeping them, that they may always be subject to future recall, for the benefit of the *cestui que trust*. The investment of such funds by a trustee in canal, bank, insurance, railroad, or other stocks of private corporations, is a violation of his duty and the obligation of his trust. *King v. Talbot*, 40 New York (Hand's), 76, . . . 322
14. MUST NOT BE EXPOSED TO HAZARD.—As to money held upon trust of this kind, it is not according to the nature of the trust, nor within any just idea of prudence, to place the principal of the fund in a condition in which it is necessarily exposed to the hazard of loss or gain, according to the success or failure of the enterprise in which it is embarked, and in which, by the very terms of the investment, the principal is not to be returned at all.—*Ib.*
15. IMPROPER INVESTMENTS.—Accordingly *held*, that where the interest upon certain legacies were, by the terms of the will, to be applied by the executors, so far required, to the maintenance and education of the legatees

during their minority, and the principal, with any accumulations thereon, to be paid to them severally on their coming of age, and the executors, upon whom the trust was imposed, invested the funds in stocks other than state or national, the legatees, upon coming of age, were not bound to accept such investments, but had the right to call upon the executors to pay the amount of their legacies and interest. *Held, further*, that the proper rate of interest, with which the executors are to be charged in such case, is six per cent, with annual rests.—*Ib.*

16. The proper mode of making up the interest account upon this basis, where the executors have made advances for the maintenance of the legatees during their minority, stated.—WOODRUFF, J.—*Ib.*
17. It seems, that *cestuis que trust*, in the case of improper investments, which are divisible, are not limited to rejection of *all* or *none* of them, but may accept such as they choose and reject the others, 323
18. Where no provision is made by a testator for the support of his minor children, other than by the income to be derived from the legacies bequeathed to them, as between the legatees and the estate, such legacies draw interest from the death of the testator.—*Ib.*
19. In New York a trustee holding funds for investment for minor children, must invest in Government or real estate securities. Any other investment would be a breach of duty, and the trustee personally liable.—*Ib.*

ULTRA VIRES:

See CORPORATION, 16.

WILL:

1. ELECTION BETWEEN DEVISEES.—Before a devisee can be required to make an election, the will must clearly show that the testator so intended. Every case of election supposes a plurality of gifts or rights to the party who has the right to control one or both, that one should be substituted for the other. *Faris v. Dunn*, 7 Bush, 276, 207

See EXECUTORS' PURCHASE OF TRUST PROPERTY; TRUSTEE UNDER WILL.

YORK BUILDING COMPANY'S CASE:

History of, n.85

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